TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 505.

EL PASO & NORTHEASTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

ENEDINA GUTIERREZ, ADMINISTRATRIX OF THE ESTATE OF ANTONIO GUTIERREZ, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

FILED JUNE 18, 1909.

(21,731.)

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1 *Caption.*

STATE OF TEXAS,
County of El Paso:

At a Term of the District Court of El Paso County Texas, 41st Judicial District of the State of Texas, begun and holden at the Court House in El Paso County within and for the said County of El Paso and State of Texas, before Hon. J. M. Goggin, Judge, begun on the 4th day of Nov. A. D. 1907, and ending on the 4th day of Jan'y A. D. 1908, the following case came on for trial and the following proceedings were had to-wit:

No. 6523.

ENEDINA GUTIERREZ
vs.
EL PASO & NORTHEASTERN RY. CO. et al.

In the District Court of El Paso County, Texas, 41st Judicial District, May Term, A. D. 1907.

No. 6523.

ENEDINA GUTIERREZ, as Administratrix of the Estate of Antonio Gutierrez, Deceased,
vs.
EL PASO & NORTHEASTERN RAILWAY COMPANY.

Pl'ff's Original Petition. Filed April 19th, 1907.

Your petitioner, Enedina Gutierrez, a resident of El Paso County, Texas, brings this suit and files this petition as administratrix of the estate of Antonio Gutierrez, deceased, for her sole benefit. — the El Paso and Northeastern Railway Company, a corporation duly incorporated, under and by virtue of the laws of the Territory of New Mexico, and thereupon plaintiff alleges:

First. That at a regular term of the County Court of El Paso County, Texas, which was a court of competent jurisdiction to appoint administrators of the estates of deceased persons, on the
2 5th day of November A. D. 1906, she was, by order of said court; duly made and entered of record, appointed administratrix of the estate of Antonio Gutierrez deceased, and that thereupon she executed bond as such administratrix in the sum required by the order of said court, and that letters of administration were duly issued to her in pursuance of said order of said court; that she had duly administered to her, the oath of administrators according to the laws of Texas and is now the duly appointed and qualified administratrix of said estate.

Second. That the defendant has an agent and local representative

residing in El Paso County Texas, and representing it therein; to-wit: E. H. Maggard, and that defendant has a general officer, to-wit: H. J. Simmons General Manager of said corporations, who also resides in El Paso County, State of Texas; that defendant is engaged in business in the County of El Paso and State of Texas, and maintains its offices therein, and transacts the business of said company therein.

Third. That said railroad company, was on and prior to June 22nd 1906, *was* operating trains over the track owned by it from Newman Station in New Mexico to and beyon*g* Carrizozo, New Mexico, and was engaged as a common carrier of commerce in said Territory and from said Territory into States adjoining thereto, and defendant was at and before June 22nd, 1906, acting in maintaining said track through working trains and otherwise.

Fourth. That Antonio Gutierrez, who was on June 22nd, 1906, and long prior thereto the lawful husband of plaintiff was
3 employed by defendant corporation, to work with other employees on and about one of the work trains used by said company in maintaining said track and road bed, which said train was then being operated for the purpose of repairing and maintaining said track; that the movement of said train was directed by the employees of defendant company*s*; that on the 22nd day of June, while said train was approaching Oscuro Station, New Mexico, from the north or northeast, and when it was within a few hundred feet of the northeast end of the switch or side track at Oscurro, the said Gutierrez was directed by one of said employees to go to a car near the rear of said train and get some shovels or spades and bring them to a front car, the foreman intending to make a flying switch and place a front car or more on the side track while the engine and a car or more would run on the main line and wished the shovels placed on a car which was to go with the engine on the main line; that Antonio Gutierrez went as directed to a car on which were some of the shovels and was bringing one or more to another car when the said employees negligently and in violation of the rules of said company, forbidding such switching except when great delay would be caused in doing the work any other way and when no such delay would have been caused commenced to make what is called a flying switch; that is, they caused the engine to move the train rapidly up to a short distance before reaching the side track and then to stop suddenly, slack the pressure between the cars to enable them to be uncoupled and then permit the forward cars to run on the side track, change the switch and throw the engine and car or cars following on the main track; that just at the time the cars were uncoupled, said Gutierrez was attempting to step from one to the other
4 with a shovel; that the employee who uncoupled said cars did so without notice or warning to said Gutierrez, though said employee saw, or might by the use of ordinary care, have seen that said Gutierrez was about to cross from one car to the other; that said Gutierrez did not know of said intended uncoupling; that just as the uncoupling was made, a slight jar occurred from the giving of slack to allow said uncoupling; that said Gutierrez was not informed that said flying switch was being made, nor did he know

thereof, or know of the purpose to cut said train that by reason of said jar and said sudden uncoupling, just as said Gutierrez was about to step from one car to another he stepped and fell immediately in front of the car he intended to step from, on to another, and was run over and killed by said car. And Plaintiff now alleges that the said employees in making said flying switch, in violation of the rules of said company and without notice thereof to said Gutierrez and in failing to look out for him as he was about to step from one car to another or if they saw him about to pass between the cars then in failing to avoid injuring him failed to exercise that care for the safety of said Gutierrez which persons of ordinary prudence exercise under like circumstances and were guilty of gross negligence and that said negligence was the direct and proximate cause of the death of said Gutierrez.

That the rule of defendant company in force when said accident occurred is in words as follows:

339. Running or flying switches must not be made except where it would cause great delay to do the work in any other manner; and whenever they are made, the train must first be stopped and before the engine is again started the switch and also the brakes on
5 the cars to be set out, must be tested, and great care used.

Running or flying switches must not in any case be made at or over any public road or street crossing.

Fifth. That at the time of his death, the said Gutierrez was at the age of Twenty-Three (23) years, that he was a healthy robust man and that plaintiff is a healthy woman and each of them, at the time of his death, had a reasonable expectation of living forty years or more; that he was industrious and usually earned and was earning at the time of his death one dollar and twenty-five cents ($1.25) per day as a laborer, so that he acquired that much money per day to devote to the support and maintenance of his said wife, the plaintiff herein and himself; that he had no child or children, that plaintiff was regularly supported by her husband and had reasonable expectations that he would have contributed as much as one Dollar ($1.00) per day to her, or Three Hundred Dollars ($300.00) per annum, for the working days exclusive of Sundays and legal holidays, making in the aggregate Twelve Thousand Dollars ($12,000.00) for the period during which she and he had a reasonable expectation of life when he was killed.

Therefore she was damaged by the negligence of the employees of the defendants in the sum of Twelve Thousand Dollars ($12,000.00) for which sum she sues.

Sixth. Premises considered plaintiff prays for process pursuant to law, and that on final trial of this case she, as administratrix, have judgment for Twelve Thousand Dollars, ($12,000.00) damages to her, by reason of the negligent killing of her said husband, and all costs of suit against the defendant for her sole use.

F. G. MORRIS,
Attorney for Plaintiff.

6 Endorsed: No. 6523 41st Enedina Gutierrez, Adm'r, vs. El Paso & North Eastern Railway Co., et al. Plaintiff's Original

Petition. Filed this 19th day of April A. D. 1907. I. Alderete, Clerk District Court El Paso Co., Texas, E. B. McClintock, Deputy.

In the District Court for the Forty-first Judicial District of the State of Texas for El Paso County.

No. 6523.

ENEDINA GUTIERREZ, as Administratrix of the Estate of Antonio Gutierrez, Plaintiff,

vs.

EL PASO & NORTHEASTERN RAILWAY CO., Defendant.

Def't's Answer. Filed Nov. 18th, 1907.

First. This defendant excepts to said petition and for grounds of exception states that the same does not set up facts sufficient to constitute a cause of action against it, and of this it prays the judgment of the court.

HAWKINS & FRANKLIN,
Attorneys for Defendant.

Second. And for answer to said petition said defendant denies each and every allegation therein contained and denies that it is guilty of any of the wrongs, injuries, or trespasses of which plaintiff has complained against it, and of this it puts itself upon the country.

HAWKINS & FRANKLIN,
Attorneys for Defendant.

Third. And for further and special answer in this behalf this defendant says that the said plaintiff is not now and was not, at the time it is alleged in said petition, that Antonio Gutierrez
7 was injured and killed, a resident of the State of Texas and a citizen of the United States, but, that she was at that time and still is an alien and a citizen of the Republic of Mexico, and that Antonio Gutierrez, at the time it is alleged that he was injured and killed, was also an alien and a citizen of the Republic of Mexico.

All of which defendant is ready to verify.

Wherefore, etc.

HAWKINS & FRANKLIN,
Attorneys for Defendant.

Fourth. And for further and special answer in this behalf this defendant says that if the deceased Antonio Gutierrez was injured and killed as by plaintiff alleged in her said petition which this defendant denies, that then the injuries resulting in his death were not caused or contributed to by any negligence of defendant but that the same were entirely caused and contributed to by the gross negligence of the said deceased. That when deceased was injured,

if he was injured and killed, which defendant does not admit but denies, he was riding on or near the end of a certain car that was then in motion or he was attempting to step from said car to another near thereto, and that in so riding upon said car under such circumstances and near the end of the same or in attempting to step from the same to another car, the deceased was guilty of negligence and that such negligence upon his part proximately contributed to the injuries which resulted in his death, if he was killed, and this defendant is ready to verify.

Wherefore, etc.

HAWKINS & FRANKLIN,
Attorneys for Defendant.

8 Fifth. And for further and special answer in this behalf defendant alleges that if deceased was injured and killed as alleged by plaintiff, which defendant denies, that then at the time when he was so injured and killed he was in violation of the regulations and rules of the company then employing him, riding at or near the end of the car that was moving along the railroad track; that had he not been so riding in violation of said rules or regulations, he would not have been injured, and that his act in so riding was gross negligence proximately contributing to cause his injuries alleged to have been caused and which resulted in his alleged death, and that therefore plaintiff cannot recover, and this defendant is ready to verify.

HAWKINS & FRANKLIN,
Attorneys for Defendant.

Sixth. And for further and special answer in this behalf, defendant says that if the said deceased was injured and killed as alleged by plaintiff, which defendant does not admit but denies, that then the same was proximately caused or proximately contributed to by the negligence of said deceased, and that plaintiff, cannot, therefore, recover. And this defendant is ready to vertify.

HAWKINS & FRANKLIN,
Attorneys for Defendant.

Seventh. And for further and special answer in this behalf, defendant alleges that if the said deceased was injured and killed as by plaintiff alleged, which defendant does not admit but denies, that then his injuries and death were not caused or contributed to by any act of negligence upon the part of defendant, or of its agents, servants or employees, but resulted either from the negligence of the deceased or was an accident ordinarily incident to the
9 business in which deceased was then employed and that deceased assumed the risk thereof, and therefore Plaintiff cannot recover.

And this defendant is ready to verify.

HAWKINS & FRANKLIN,
Attorneys for Defendant.

Eight-. And for further and special answer in this behalf defendant alleges that on the 22nd day of June, 1906, and at the time

when plaintiff alleges deceased was killed the said plaintiff was an alien and a non-resident of the United States of America and was at that time a citizen of and residing in the Republic of Mexico.

That if plaintiff is now a resident of the State of Texas as alleged by her in her petition in good faith which defendant denies, that then after the time when plaintiff alleges that deceased was killed she removed her residence from the Republic of Mexico to the State of Texas, not for the purpose of establishing a residence in said State in good Faith but for the fraudulent purpose of attempting to give jurisdiction to this court of her alleged cause of action and of establishing liability for the alleged death of the deceased against defendant under the Statutes of the United States.

All of which defendant is ready to verify.

Wherefore, etc.

HAWKINS & FRANKLIN,
Attorneys for Defendant.

Ninth. And for further and special answer in this behalf, defendant says that if the said deceased was injured and killed as by plaintiff alleged in her petition, which defendant denies that then such injuries and death were occasioned within the Territory of New Mexico, and that at the time when he was so injured and
10 killed and on June 22nd, 1906, and for a long time prior thereto and now there was and is in existence in said Territory of New Mexico a certain written law and statute, which is in words and figures substantially as follows:

SECTION 1. Hereafter there shall be no civil liability under either the common law or any statute of this Territory on the part of any person or corporation for any personal injuries inflicted or death caused by such person or corporation in this Territory, unless the person claiming damages therefor shall within ninety days after such injuries shall have been inflicted make and serve upon the person or corporation against whom the same is claimed, and at least thirty days before commencing suit to recover judgment therefor, an affidavit which shall be made before some officer within this Territory who is authorized to administer oaths, in which the affiant shall state his name and address, the name of the person received such injuries, if such person be other than the affiant, the character and extent of such injuries in so far as the same may be known to affiant, the way or manner in which such injuries were caused in so far as the affiant has any knowledge thereof, and the name and addresses of all witnesses to the happening of the facts or any part thereof causing such injuries as may at such times be known to affiant, unless the person so claiming such damages shall also commence an action to recover the same within one year after such injuries occur, in the District Court of the Territory in and for the County in which such injuries occur, or in and for the County of this Territory, where the claimant or person against whom such claim is asserted resides, or in any event such claim is asserted against a corporation, in the County in this Territory where
11 such corporation has its principal place of business; and said suit after having been commenced shall not be dismissed by

plaintiff unless by written consent of the defendant filed in the case, or for good cause shown to the court; it being hereby expressly provided and understood that such right of action is given only on the understanding that the foregoing conditions precedent are made a part of the law under which right to recover can exist for such injuries except as herein otherwise provided." And defendant alleges that under and in accordance with said law there is no civil liability under either the common law or any statute or other law of the Territory of New Mexico at this time and was not on the said 22nd day of June, 1906, and when plaintiff claims deceased was injured, on the part of any person or corporation, for any personal injuries inflicted by any such person or corporation, or its servants, agents or employés, on another in said Territory of New Mexico, unless the person claiming damages therefor, within ninety days after such injuries were inflicted and at least thirty days before commencing suit to recover judgment therefor, made and served upon the person or corporation against whom the said damages were claimed, an affidavit made before some person within said Territory authorized to administer oaths, in which affiant should state his name and address the name of the person receiving such injuries, if such person be other than the affiant, the character and extent of such injuries, in so far as the same might be known to affiant, the way or manner in which said injuries were caused, in so far as affiant has any knowledge thereof and the name and addresses of all the witnesses
12 to the happening of the facts or any part thereof causing such injuries as might at such time be known to affiant and unless the person so claiming such damages should also commence an action to recover the same within one year after such injuries occurred in the district court of said territory in and for the county of said Territory in which said injuries occur or in and for the county of said Territory where the Claimant or person against whom such claim is asserted resides, or in event such claim is asserted against a corporation, in the County of said Territory where such corporation has its principal place of business. And defendant alleges that though the defendant had and maintained a principal place of business in the Territory of New Mexico on the 22nd day of June, 1906, and has had and maintained the same since that date, and now has such principal place of business thereat, and there has, and then had an agent upon whom process can be easily had, and though the territory of New Mexico on the 22nd day of June, 1906, ever since that date, and now, has courts in the Territory of New Mexico, under the constitution aforesaid, who have jurisdiction and laws of the United States and the laws of the Territory of New Mexico to determine whether or not the said defendant is liable to the plaintiff in damages or otherwise for the injuries alleged to have been sustained by deceased, and of furnishing to the Plaintiff a redress for such injuries, yet no such affidavit above referred to was ever made or served upon this defendant, though more than ninety days since the happening of the alleged facts which plaintiff says caused the injuries complained of have elapsed, and neither has the said plain-

tiff instituted any such suit in any district or other court in
13 said Territory of New Mexico.

Wherefore, this defendant says, that under and — accordance with the said law, no civil liability upon its part or on account of the matters or things set up in said petition of plaintiff has arisen, and that plaintiff is not entitled to damages against it, and this this defendant is ready to verify.

Wherefore, etc.

HAWKINS & FRANKLIN,
Attorneys for Defendant.

Tenth. And for further and special answer in this behalf, this defendant says that at the time when the plaintiff alleged the said Antonio Gutierrez was injured and killed, the train upon which it is alleged he was riding and from which it is charged he fell or was thrown, was being operated in the same manner in which it had always been operated; that the said Antonio Gutierrez had worked at the same character of work at which he was then engaged for a long period prior to such time and was familiar with the manner in — said train was being operated and said switch was made, and in the usual manner of making, flying switches, and if there was *in* danger in making the same, which this defendant denies, that then he appreciated the same and assumed such danger, if any, and cannot recover. And this defendant is ready to verify.

Wherefore, etc.

HAWKINS & FRANKLIN,
Attorneys for Defendant.

Endorsed: No. 6523. In the District Court of the Forty First Judicial District of the State of Texas for the County of
14 El Paso. Enedina Gutierrez as administratrix of the estate of Antonio Gutierrez, Plaintiff, vs. El Paso & Northeastern Railway Co. Defendant. Amended Answer. Hawkins & Franklin, El Paso, Texas, Attorneys for defendant. Filed this 18th day of Nov. A. D. 1907. I Alderete Clerk District Court, El Paso Co., Texas, E. B. McClintock, Deputy.

ENEDINA GUTIERREZ, Adm'r,
vs.
EL PASO & N. E. RY. CO.

Now comes the plaintiff and demurs to that part of defendant's answer wherein the territorial laws of New Mexico are pleaded.

Pl'ff's Supplemental Petition. Filed Nov. 23rd, 1907.

1. Because said laws are superceded by the acts of Congress.

2. Because said Territorial laws in so far as they deny the right to sue in Texas for an injury occurring in New Mexico and in so far as they require a person having a cause of action for an injury occurring therein to make a trip to New Mexico to make an affidavit

before an officer therein is unconstitutional and void under the acts of Congress and the Constitution of the United States.

3. And further replying to said answer plaintiff denies all and singular the allegations therein contained.

4. And further replying to said answer plaintiff says that the death of the plaintiff's husband of whose estate she is legal representative occurred since the passage of the act of Congress of June 11th, 1906, prescribing liability of certain common carriers to their employés in certain cases which makes and prescribed the
15 circumstances under which employees of railroad companies engaged in commerce in a territory, or their legal representatives if death occurs which law is exclusive of and repeals, the other laws of New Mexico which are pleaded by defendant.

F. G. MORRIS,
Att'y for Plaintiff.

Endorsed: No. 6523. Gutierrez vs. E. P. & N. E. Railway Co. Plaintiff's First Supplemental Petition Filed this 23rd day of Nov. A. D. 1907. I Aldetere, Clerk District Court El Paso Co. Texas. V. F. Cassens, Deputy.

In the District Court of El Paso County, Texas, 41st Judicial District, November Term, A. D. 1907.

No. 6523.

ENEDINA GUTIERREZ
vs.
EL PASO & NORTHEASTERN RAILWAY COMPANY et al.

Charge of the Court. Filed Nov. 26th, 1907.

Gentlemen of the Jury:

This is a suit by plaintiff, Enedina Gutierrez as administratrix of the estate of Antonio Gutierrez, deceased, against the El Paso & Northeastern Railway Company defendant, for damages on account of the death of the said deceased, Antonio Gutierrez.

Plaintiff alleges that on the 22nd day of June, 1906, and for a long time prior thereto, Plaintiff was the wife of the said Antonio Gutierrez, and that on said date and long prior thereto the said Antonio Gutierrez was and had been employed by the defendant, the El Paso and Northeastern Railway Company upon one of its work trains as a common laborer. That said train was being operated and maintained for the purpose of repairing and keeping in order the defendant's track and road bed.

16 That on the said 22nd day of June, 1906, while said train was approaching Oscuro Station, in the Territory of New Mexico, and when same was within a few hundred feet of the end of the switch or side track at Oscuro, the said Gutierrez, deceased, was directed by the defendant company to go to a car near the rear of said train and get some shovels or spades and bring them to a

front car. That while the deceased was in the act of discharging this duty imposed upon him, and was transferring the shovels from one car to another, standing on the end of a car or cars in said train, those in charge of said train attempted to make a flying switch and for that purpose said train moved rapidly for a short distance before reaching said track, and then stopped suddenly and the pressure slacked between the cars to enable them to be uncoupled, and permitted the forward cars to run upon the side track, the switch was changed so as to throw the engine and cars following on the main track, and that when the said Gutierrez was changing said shovels and attempted to step from one to the other of said cars with the shovels, said two cars upon which he was passing over, one to the other, were uncoupled for the purpose of making said switch, without notice or warning to the said Gutierrez by one of the defendant's servants, and that by reason of such uncoupling just as the said Gutierrez was about to step from one car to another, said cars separated and the said Gutierrez fell immediately in front of the said car he intended to step up on and was run over and killed; and the plaintiff alleges that in making said flying switch in violation of the rules and without notice thereto to Gutierrez, and in failing to look out for him as he was about to step from one car to another the defendant's servants in charge of said
17 train and cars were guilty of negligence, and such negligence was the proximate cause of his being thrown to the ground, run over and killed.

The defendant answers by a general denial and specially denies any negligence on its part, or on the part of its servants and says that if the plaintiff's said husband, Gutierrez lost his life that his death was caused by his own negligence, or that his negligence contributed to cause his death, and that she should not recover.

Now as to the rules of the law applicable to the cause the court instructs you as follows:

First. You are the exclusive judges of the credibility of the witnesses and the weight to be given to the testimony, but you are not the judges of the law. The law of the case you will take from this charge and the special charges, if any, given you herewith, and it is your duty to be governed thereby.

Second. The burden of proof in the case rests upon the plaintiff and before she can recover she must establish all the facts necessary to a recovery by a preponderance of the evidence.

Third. By "Proximate Cause", as that term is used in this charge, is meant the direct cause without which the injury and the death of the said Antonio Gutierrez would not have occurred.

Fourth. You are instructed that railway companies are not to be regarded as insurers of the safety of their employees, for un-
18 der the law they are not insurers, and one who enters the employment of a railway company assumes all the risks that are ordinarily incident to the business but he may assume that the railway company and its servants and employees will exercise ordinary care to do their duty, and he does not assume the risk of any danger that may be brought about by the negligence of the

railway company or its servant or employés in charge of its trains, unless he knows of such negligence and the attendant risks or in the ordinary discharge of his duty must necessarily have acquired the knowledge.

Fifth. You are instructed that it is the duty of a railway company acting through its agents and servants, to exercise ordinary care to prevent and avoid injury to its other employés while engaged in the discharge of their duty; and to that end it is the duty of the servants and employees of railway companies in charge of and operating trains and cars to exercise ordinary care while engaged in the operation of switching of such trains or car, to prevent and avoid injuring other employees working upon or about such cars, and the failure on the part of such railway company's employees in charge of such trains or cars to exercise such ordinary care and prudence, is negligence.

Sixth. You are instructed that it — the duty of every person working upon and about railway cars to exercise ordinary care to prevent and avoid injury and death to himself, and the degree of care required is always proportionate to the degree of danger indicated by the facts and circumstances of the case, or that which may have reasonable been foreseen by a person of ordinary prudence under like circumstances, and a failure to exercise such ordinary care and prudence is negligence.

And you are further instructed that by "contributory negligence" is meant some negligent act or omission on the part of the person killed, or injured which, concurring or co-operating with some negligent act or omission on the part of the defendant is the proximate cause of the injury or death, complained of.

Seventh. Now, you are instructed that it is provided by law; that in the Territories where the death of an employee of a railway company while engaged in the discharge of his duty is brought about by the negligence of another employee or servant, of the company also so engaged the railway company shall be liable to the personal representative of the deceased, for the benefit of his surviving widow for all damages which may result to such widow by reason of such negligence; unless the person killed has assumed the risk of the danger which caused his injury, or unless such negligence is defeated by contributory negligence on the part of the person injured.

But you are instructed in this connection that it is further provided that the fact that the employee killed may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight, and that of the railway company was gross in comparison, but the damages in such case shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

You are further instructed that if the employee killed has been guilty of negligence, and by such negligence has contributed to bring about his death, and the defendant, railway company, has also been guilty of negligence contributing to bring about such death, but the negligence of the person so killed was slight in comparison with the negligence of the railway com-

pany, and that of the railway company or its servants gross in comparison with that of the deceased, that the plaintiff would not be barred of a recovery by such contributory negligence on the part of the person so killed, but the damages sustained by the plaintiff should and must be diminished by the jury in proportion to the amount of negligence attributable to the person so killed. If on the other hand, both the Railway company and the person killed has been guilty of negligence contributing to bring about such death but the negligence of the person killed was not slight in comparison or was gross in comparison with the negligence of the railway company, then the plain- would be barred from a recovery by such contributory negligence on the part of the person killed, and in that case the plaintiff cannot recover.

Eighth. Now, if you believe from a preponderance of the evidence that the said deceased, Antonio Gutierrez, had, as alleged been directed to remove said shovels from one car to another and that while engaged in doing so, in the discharge of his duty, he stepped from one car to another or was standing with one foot upon one car and one upon the other and those in charge of said train attempted to make a flying switch, as alleged, and in doing so one of the servants operating said train uncoupled the cars from one to the other of which the deceased was crossing or stepping, without giving the deceased any warning, and said cars were thereby caused to and did separate, and the deceased Antonio, was thrown to the track and run over and killed, as alleged, *and*, and that the uncoupling
21 of said cars without giving Antonio Gutierrez any warning and permitting them to so separate if such was the case, was under all the surrounding facts and circumstances negligence and that such negligence on the part of those in charge of said train or cars if any, was the proximate cause of the deceased being thrown or caused to fall to the ground and run over and killed; and you further believe from the evidence that the deceased himself was not guilty of negligence contributing to cause his death or that his negligence, if he was negligent, was slight in comparison with such negligence if any, on the part of those in charge of said cars which you have so found if any, that the negligence if any, on the part of those in charge of said cars was gross in comparison with that of the deceased, if any, and further believe that the deceased did not assume the risk, then and in that event you- verdict will be for the plaintiff.

Ninth. Unless you believe from a preponderance of the evidence the defendant's servants in charge of said cars or train, or one of them, was or were guilty of negligence, as that question is submitted to you for your consideration and determination your verdict must be for the defendant.

Therefore, if you believe from the evidence that those in charge of said cars exercised ordinary care to avoid injurying the other employees upon and about said cars, your verdict will be for the defendant company.

Tenth. If you believe from the evidence that the defendant's servant in charge of said cars, or one of them, was or were guilty

of negligence, as charged, and further believe from the evi-
22 dence that the deceased was guilty of negligence contributing to cause his injury, and believe from the evidence that the deceased's negligence was not slight in comparison with the negligence, if any, of those in charge of said cars; or believe that the negligence, if any, on the part of the deceased was gross in comparison with the negligence which you find, if any, against the defendant, then and in that event your verdict will be for the defendant company: for if both the deceased and the defendant Co. were guilty of negligence and the deceased's negligence was not slight in comparison with the negligence of the defendant, or was gross in comparison with that of the defendant if any then the plaintiff is barred from a recovery.

If you believe from the evidence that the defendant was guilty of negligence in the respects charged, and submitted to you for your determination, and that such negligence contributed to bring about the deceased's death but you further believe that the deceased in taking up the position which he did upon said cars while the same were being so moved was guilty of negligence contributing to bring about his death, or you believe that he stood with one foot upon one of said cars and the other upon another and that in so doing he was guilty of negligence and you further believe that such negligence, if any, on the deceased's part was not slight in comparison, or was gross in comparison with such negligence, if any, on the part of those in charge of said cars, then and in that event also your verdict will be for the defendant, as in such case the plaintiff cannot recover.

On the other hand, if you believe from the evidence that the defendant's servants in charge of said cars were guilty of negligence
as charged in the petition, as that question is submitted to
23 you for your consideration and determination, and you believe that deceased was killed as a proximate result thereof, and you believe from the evidence that the deceased himself was guilty of negligence contributing to cause his own death, but you believe from the evidence that the deceased's negligence was slight in comparison with the negligence, if any, so found by you against those in charge of defendant's cars, and that the negligence causing deceased's death, on the part of those in charge of said cars, if any, was gross in comparison with the negligence of the deceased if any, then and in that event you will ascertain from the evidence the damages under the instructions hereinafter given you, the deceased's wife has suffered by reason of the death of the said Gutierrez, as a proximate result of such negligence on the part of the defendant's servants, in charge of said cars, if any, coupled with that of the deceased, if any, but you will diminish the amount of her damages if any, so suffered in proportion to the amount of negligence attributable to him, the said deceased.

That is, to say: if the negligence of the defendant's servants was gross in comparison *of* the negligence of the deceased, if any, you will compare the negligence of the deceased with that of the defendant's servants in charge and diminish the amount of Plaintiff's

recovery, if any, in accordance with the proportion which deceased's negligence if any, bore to that of the defendant company, as hereinbefore stated.

Eleventh. If you find for the plaintiff and allow her damages, in estimating her damages you will consider the pecuniary value of the life of the said Antonio Gutierrez, to her, and you will ascertain from the evidence what sum, if paid now will compensate her for the actual pecuniary loss which she has sustained if any, by
24 reason of the death of the said Antonio Gutierrez; and if you do not find from the evidence that the said deceased Gutierrez, was guilty of contributory negligence, then you will allow the said plaintiff such sum, if paid *not*, as you believe from the evidence will fairly compensate her for the pecuniary loss which she has sustained, if any, in consequence of the said Gutierrez's death. If, however, you find for the plaintiff and allow her damages and believe from the evidence that the said deceased was guilty of contributory negligence, but believe that the deceased's negligence was, if any, slight, in comparison with that of those in charge of said cars which you have so found, if any, and that the negligence if any, of those in charge of and operating said cars was gross in comparison with that on the part of the said deceased, if any, contributed to bring about the injury, then in estimating the damages you will also, as above, take into consideration the actual pecuniary loss sustained by the plaintiff, if any, in consequence of the death of the said Gutierrez, and ascertain what such sum, if paid now, will reasonably compensate the said Plaintiff for such pecuniary loss, and thus after ascertaining the amount of damages, if any, which has accrued to the plaintiff in consequence of the said Gutierrez's death, you will then take into consideration the relative amount of negligence, if any, of the defendant's servants in charge of said cars, which you may have so found against the defendant company, and the amount of contributory negligence if any, which you find against the deceased you will compare the same and you will *diminish* the amount of damages which the plaintiff would be entitled, to recover under the above rule in proportion to the amount of
25 negligence so attributable to the deceased as stated above.

J. M. GOGIN.
Judge 41st Judicial District of Tex.

Endorsed: No. 6523 Enedina Gutierrez vs. El Paso and Northeastern Railway Company et al. Charge of the court Filed this 26th day of Nov. A. D. 1907. I Alderete, Clerk District Court El Paso Co., Texas, V. F. Cassens, Deputy.

In the District Court of El Paso County, 41st Judicial District.

ENEDINA GUTIERREZ
vs.
EL PASO & NORTHEASTERN RAILWAY COMPANY.

Pff's Special Charge No. 1. Filed Nov. 26th, 1907.

Special Charge No. 1 Requested by Plaintiff.

Counsel for plaintiff requests the court to charge the jury as follows:

With reference to the plea of alienage made by the defendant in this case, to the effect, that Antonio Gutierrez was an alien at the time he was killed, and that his wife, who sues in this case, is also an alien, you are instructed, first, that there is no evidence before you that they were not naturalized citizens at the time of the occurrence in question, and further that if they were aliens they are entitled to be treated for all of the purposes of this suit, in all respects as though they were citizens of the United States.

F. G. MORRIS,
Att'y for Plaintiff.

"Given."
J. M. GOGGIN, *Judge.*

Endorsed: Enedina Gutierrez, Adm'x, vs. El Paso & N. E. Ry. Co. Special Charge No. 1, requested by plaintiff. Filed this
26 26th day of Nov. A. D. 1907, I Alderete Clerk District Court El Paso Co., Texas, V. F. Cassesn, Deputy.

In the District Court of El Paso County, 41st Judicial District.

ENEDINA GUTIERREZ
vs.
EL PASO AND NORTHEASTERN RAILWAY COMPANY.

Pff's Charge No. 3. Filed Nov. 26th, 1907.

Special Charge No. 3 Requested by Plaintiff.

Counsel for Plaintiff requests the court to charge the jury as follows:

If the jury shall believe from the evidence that the decedent Antonio Gutierrez, in attempting to cross from one car to another, was guilty of negligence, but shall further believe from the evidence that before any injury resulted to him the brakeman, an employé of defendant's, who uncoupled the cars at the place where the said Antonio Gutierrez was about to cross, saw the position of the said Antonio Gutierrez, and knew of his purpose, and effort to cross from one car to the other, and of the danger if any danger there

was, in his attempting to do so, before the said brakeman uncoupled said cars, and that he uncoupled the same without any warning to the said Antonio Gutierrez, then you are instructed that it would be unimportant whether the said Antonio Gutierrez was guilty of negligence or not in attempting to cross from one car to another, because in such event the defendant company would be liable on account of discovery by its employé of the peril in which the said Antonio Gutierrez had placed himself before said uncoupling was made.

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F. G. MORRIS,
Att'y for Plaintiff.

"Given."
J. M. GOGGIN, *Judge.*

Endorsed: Enedina Gutierrez Adm'x vs. El Paso and N. E. Ry. Co. Special Charge No. 3, requested by plaintiff filed this 26th day of Nov. A. D. 1907. I. Alderete Clerk District Court, El Paso County, Texas. V. F. Cassens Deputy.

No. 6523.

ENEDINA GUTIERREZ, Administratrix,
vs.
EL PASO AND NORTHEASTERN R. R. Co.

Def't's Charge No. 1. *Filed Nov.* 26*th*, 1907.

Gentlemen of the jury:

In this case you are instructed to find for the defendant.

HAWKINS & FRANKLIN,
W. B. WARE,
Att'ys for Def't.

"Refused."
J. M. GOGGIN, *Judge.*

Endorsed: No. 6523 Gutierrez, Adm'x vs. E. P. & N. E. R. R. Co. Def't's 1st Special Charge filed this 26th day of Nov. A. D. 1907. I. Alderete Clerk District Court El Paso Co., Texas, V. F. Cassens, Deputy.

No. 6523.

ENEDINA GUTIERREZ, Adm'x,
vs.
EL PASO & NORTHEASTERN RAILWAY COMPANY.

Judgment and Verdict.

On this day this cause came on for trial and the plaintiff, Enedina Gutierrez Administratrix, appeared by her attorney F. G. Norris, and the defendants by their attorney, W. B. Ware and the plain-
28 tiff said she would no further prosecute this suit against the defendant the El Paso & Northeastern Railroad Company of

Texas. It is therefore ordered, adjudged and decreed by the court that the plaintiff take nothing by this suit as against the El Paso — Northeastern Railroad Company of Texas, and that the said defendant company go hence without *date* and recover of and from the plaintiff all its costs in this behalf expended.

The plaintiff thereupon presented her demurrer to that part of defendant's answer wherein defendant pleaded the act of the Territory of New Mexico as the law governing the rights of the parties in this cause and the court having duly considered said demurrer.

It is ordered that the same be and it is hereby sustained to which ruling defendant in open court excepted.

And thereupon both parties through their respective attorneys announced ready for trial. A jury of good and lawful men consisting of T. H. Rogers and eleven others having been selected empanceled and sworn according to law, the trial of this cause before the court and the jury was begun and the pleadings of the respective parties were read to the court and jury and the hearing of the evidence was begun and continued during the day of Nov. 25th, 1907, and was resumed on this the 26th day of November 1907, and the jury having heard the pleadings and the evidence and argument of counsel and the charge of the court retired to consider of their verdict and afterwards on said day returned into open court the following verdict:

No. 6523.

ENEDINA GUTIERREZ
vs.
29 EL PASO & NORTHEASTERN RY. CO. et al.

We the jury in the above styled cause find for the plaintiff and assess the damages at Three Thousand Five Hundred Dollars ($3500.00).

T. H. ROGERS, *Foreman.*

It is therefore ordered, adjudged and decreed by the court that the Plaintiff, Enedina Gutierrez as administratrix of the estate of Antonio Gutierrez deceased for her personal use do have and recover of and from the defendant the El Paso and Northeastern Railway Company the sum of Three Thousand and Five Hundred Dollars and all costs of suit for which let execution issue.

(Recorded in Book 4, Page 611.)

No. 6523.

ENEDINA GUTIERREZ, Adm'x,
vs.
EL PASO & NORTHEASTERN R. R. Co.

Motion for a New Trial. Filed Nov. 28th, 1908.

Now comes the defendant and moves the court to set aside the verdict returned against it on Nov. 26th, 1907, and to grant it a new trial for the following reasons towit:

1st. The verdict is not supported by the evidence.

2nd. The verdict is contrary to the evidence.

3rd. The testimony does not show that defendant was the owner of a railroad nor that the person whose alleged negligence was the cause of the death of plaintiff's intestate, was in the employ of defendant.

4th. The testimony does not connect defendant in any way with the death of plaintiff's intestate.

5th. The testimony does not show that defendant had anything to do with the killing of plaintiff's intestate or the defendant owned or operated or controlled the railroad upon which he was killed or the train or engine by which he was killed.

5th. The proof does not show that defendant was engaged in interstate commerce.

6th. The court erred in giving special charfe No. 3, at the request of defendant.

For these and other good reasons the defendant requests the court to grant it a new trial of this cause.

HAWKINS & FRANKLIN,
W. B. WARE, *For Def't.*

Endorsed: Guiterrez Adm'x vs. E. P. & N. E. R. R. Co. Defendant's Motion for a new trial filed this 28th day of Nov. A. D. 1907. I. Alderete Clerk District Court, El Paso Co., Texas. ——— ———, Deputy.

In the 41st Judicial District Court of El Paso County, Texas.

No. 6523.

ENEDINA GUTIERREZ, Adm'x,
vs.
EL PASO & NORTHEASTERN RAILROAD COMPANY.

Def't's Amended Motion for a New Trial. Filed Dec. 7th, 1907.

Now comes the defendant and files this its amended motion for a new trial in lieu of the motion for a new trial filed herein on the 28th day of November 1907, and requests the court to set aside the verdict returned against it on the 26th day of November, 1907, and to grant it a new trial of this cause, for the following reasons to wit:

First. The verdict is not supported by the evidence.

Second. The verdict is contrary to the evidence.

Third. The Verdict is contrary to the law.

Fourth. The testimony does not show that the defendant was the owner of a railroad or engaged in the operation of a railroad, nor that the persons whose alleged negligence was the cause of the death of plaintiff's intestate was in the employ of the defendant, or that the defendant, by itself or through its agents, servants or employees contributed to or caused the death of Plaintiff's intestate.

Fifth. The testimony does not show that the defendant owned, operated or controlled the railroad upon which Antonio Gutierrez was killed, or that it was through its negligence or the negligence of any of its servants, agents or employees that he was killed.

Sixth. This is a suit for damages upon which the plaintiff seeks to recover for the death of her alleged husband, who was alleged to have been killed through the negligence of the defendant by the violation of a certain rule in force for the government of defendant's employees, and the proof does not show that the rule introduced was a rule of the defendant company, or that the employees of defendant were governed by the same in any respect.

Seventh. This is a suit for the recovery of damages under the Federal Employers Liability Act, which regulates the liability of employers engaged in interstate commerce, and in the Territories, and the proof does not show that the defendant was engaged in interstate commerce or that the defendant owned, operated or controlled any line of railroad in any territories of the United States.

Eighth. The court erred in giving special charge No. 3 at the request of defendant.

9th. The verdict is excessive.

Wherefore defendant moves the court to set aside the said verdict and grant it a new trial of this cause.

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HAWKINS & FRANKLIN,
W. B. WARE,
Attorneys for Defendant.

Endorsed: No. 6523. Enedina Gutierrez Admx. Amended Motion for new trial vs. E. P. & N. E. R. R. Co. Filed this 7th day of Dec. A. D. 1907. I. Alderete, Clerk District Court El Paso Co., Texas. L. M. Dunlap, Deputy.

No. 6523.

ENEDINA GUTIERREZ
vs.
EL PASO AND N. E. R. R. Co.

Order on Motion.

On this the 16th day of December, 1907, came on to be heard the defendant's motion for a new trial in the above case, and the court having heard the same is of the opinion that the same should be overruled.

It is therefore ordered that the said motion for a new trial be overruled, to which action of the court the defendant, the El Paso and N. E. R. R. Co. then and there excepted, and in open court gave notice of appeal to the court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

It is further ordered by an order to that effect, entered on the docket that the parties may have and are hereby granted twenty days after the adjournment of the present term of court, to present

and have approved and filed, the statement of facts and bills of exceptions.

(Recorded in Book 5, Page 12.)

No. 6523.

ENEDINA GUTIERREZ, Adm'x,
vs.
EL PASO & NORTHEASTERN RAILWAY COMPANY.

Petition for Writ of Error. Filed Jan'y 14th, 1908.

To the Clerk of the District Court of El Paso County, Texas.

33 Your petitioner, El Paso & Northeastern Railway Company, represents that heretofore, towit: on the 25th day of Nov. A. D. 1907, a judgment was rendered in this court for the sum of Three Thousand Five Hundred ($3,500.00) Dollars and costs of suit in favor of Enedina Gutierrez, administratrix of the estate of Antonio Gutierrez, deceased, against your petitioner in a certain cause pending in this court numbered on the Docket 6523 of this court in which the said Enedina Gutierrez Administratrix, was plaintiff, and your petitioner was defendant and that on the 16th day of December A. D. 1907, your petitioner having in due time filed a motion therein for a new trial, this court entered an order overruling said motion, to which action of the court your petitioner then and there excepted and then and there had his exceptions entered of record.

That on account of the many errors therein as is from the record apparent, your petitioner desires to remove the said judgment and order to the court of Civil Appeals in and for the 4th Judicial District of Texas at San Antonio for the revision and correction of the many errors therein, and that unless the same is so removed the said Enedina Gutierrez Administratrix will cause a writ of execution to issue out of this court and will cause the Sheriff of El Paso County, Texas to levy said execution upon your petitioners' property.

Your petitioner presents herewith a supersedeas bond in the sum and conditioned as required by law, and is desirous of obtaining a writ of supersedeas to suspend the enforcement of said Judgment and the levy of execution upon petitioner's property. That Enedina Gutierrez, Administratrix, aforesaid, is the only party interested in said cause adversely to your petitioner and Messrs. Frank
34 G. Morris and Geo. O. Sweeny, residents of El Paso County Texas, are her attorneys of record in said cause, and that both plaintiff and her attorneys of record are resident citizens of El Paso County, Texas.

Wherefore your petitioner prays for a writ of supersedeas to issue herein to the end that the enforcement of said judgment be suspended and that citation in error be issued to the said Enedina Gutierrez, Administratrix, and to her attorneys of record as required by law and that the said judgment and order may be removed to

the court of Civil Appeals for a revision and correction of the many errors therein and for all other proper relief.

HAWKINS & FRANKLIN,
Attorneys for Petitioner.

Endorsed: No. 6523. Gutierrez Adm'x vs. E. P. & N. E. Ry. Co. Petition for writ of error. Filed this 14th day of Jan'y A. D. 1908. I. Alderete, Clerk District Court El Paso Co., Texas. E. B. McClintock, Deputy.

In District Court El Paso County, Texas, November Term, 1907.

No. 6523.

ENEDINA GUTIERREZ, Adm'x,
vs.
EL PASO AND NORTHEASTERN RAILWAY CO.

Supersedeas Bond in Error. Filed Jan'y 15th, 1908.

Whereas, in the above entitled and numbered cause pending in the District Court of El Paso County, Texas at a regular term of said Court, towit: On the 25th day of November, 1907, the said Enedina Gutierrez, Administratrix of the estate of Antonio Gutierrez, dec'd recovered judgment against the said El Paso and Northeastern Railway Company for the sum of Three Thousand & Five Hundred Dollars, with interest thereon from the 25th day of November
35 1907, at the rate of six per cent per annum, besides costs of suit, and the said El Paso and Northeastern Railway Company on the 14th day of January 1907, filed in said District Court its petition for a writ of error, stating that it desires to remove said judgment and proceedings to our court of civil appeals for the 4th Supreme Judicial District for revision and correction. Now, therefore, we the said El Paso and Northeastern Railway Company as Principal and J. F. William and U. S. Stewart as sureties acknowledge our selves bound to pay to the said Enedina Gutierrez, administratrix, etc. the sum of Eight Thousand (8000.00) Dollars.

Conditioned, that the said El Paso and Northeastern Railway Company, Plaintiff in error, shall prosecute its said writ of error with effect, and in case the judgment of the Supreme Court or the court of civil appeals shall be against it that it shall perform its judgment sentence or decree, and pay all such damages as said court may award against it.

Witness our hands this 15th day of January, 1908.

EL PASO & NORTHEASTERN
RAILWAY COMPANY,
By W. B. WARE.
J. F. WILLIAMS.
U. S. STEWART.

Approved the 15th day of Jan'y, 1908.

I. ALDERETE,
Clerk District Court El Paso County,
By E. B. McCLINTOCK, *Deputy.*

I fix the probable amount of costs in this case in the district court, court of civil appeals and the Supreme Court at $150.00 and approve the foregoing bond this 15" day of Jan'y A. D. 1908.

I. ALDERETE,
Clerk District Court El Paso Co., Texas.
36 By E. B. McCLINTOCK,
Deputy.

Endorsed: No. 6523. In District Court El Paso County, Texas Term 1—. Enedina Gutierrez Adm'x vs. E. P. & N. E. Ry. Co. Supersedeas Bond in Error, Filed the 15" day of Jan'y, 1908. I. Alderete, Clerk District Court El Paso County. By E. B. McClintock, Deputy.

Citation in Error. Filed Mch. 11th, 1908.

State of Texas to the Sheriff or any Constable of El Paso County, Greeting:

You are hereby commanded forthwith to summon Enedina Gutierrez, Administratrix of the estate of A. Guiterrez deceased to be and appear before our court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas, sitting at San Antonio, within sixty (60) days after the date of the service of this writ, and then and there defend the writ of error granted on the petition of the El Paso & Northeastern Railway Company, plaintiff in error against Enedina Gutierrez, administratrix of the estate of Antonio Gutierrez, deceased, defendant in error, filed in this court on the 14th day of January, A. D. 1908, for the revision and correction of a certain judgment entered in the District Court of El Paso County, *Forth* First Judicial District of the State of Texas, on the 25th day of November A. D. 1907, in a certain cause pending in said court no. 6523, on the docket of said court, and wherein Enedina Guiterrez, Administratrix of the estate of A. Guiterrez, deceased, as aforesaid, is plaintiff and the El Paso and Northeastern Railway company is defendant, and described in said petition as follows:

37 That therefore, towit on the 25th day of November A. D. 1907, a judgment was rendered in this court for the sum of Thirty Five Hundred ($3500) Dollars and costs of suit, in favor of Enedina Guiterrez, administratrix of the estate of Antonio Guiterrez, deceased, against your petitioner in a certain cause pending in said court No. 6523 of this court, in which the said Enedina Guiterrez, administratrix, was plaintiff, and your petitioner was defendant, and that on the 16th day of December A. D. 1907, your petitioner having, in due time, filed a motion therein for a new trial, this court entered an order overruling said motion, to which action of the court

your *petition* then and there excepted, and defendant then and there had his exception on record.

Said judgment further provided for the interest and costs against this petitioner in favor of the said Enedina Guiterrez, Administratrix.

Herein Fail Not, but of this writ make due return within ten days from the date hereof, with your endorsement thereon, showing how you have executed the same. Given under my hand and seal of said court at office in El Paso Texas, this the 11th day of March A. D. 1908.

I. ALDERETE,
Clerk District Court El Paso Co., Texas.
[SEAL.] Per J. R. DRISCOLL, *Deputy.*

Service accepted and issuance of citation and service thereof waived this 12th day of March 1908.

F. G. MORRIS,
Att'y for Defendant in Error.

Endorsed: File No. 6523 41st District Court El Paso County, Texas. Enedina Guiterrez Admx. vs. Citation in Error E. P. and N. E. R. R. Co. Issued the 11th day of March 1908.

38 I. Alderete Clerk District Court, El Paso County, Texas. By J. I. Driscoll, Deputy. Filed this 11th day of Mch. A. D. 1908. I. Alderete Clerk. L. M. Dunlap Deputy.

In the District Court of the Forty First Judicial District of the State of Texas for El Paso County.

No. 6523.

ENEDINA GUITERREZ, Administratrix of the Estate of Antonio Guiterrez, Plaintiff,
vs.
EL PASO & NORTHEASTERN RAILWAY CO.

Assignment of Error. Filed M'ch 9th, 1908.

Assignments of Error.

Comes now the defendant, the El Paso and Northeastern Railway Company, and assigns the following errors for review and correction by the court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas, sitting at San Antonio.

First. The defendant assigns as a fundamental error the following: The Plaintiff, the administratrix of the estate of Antonio Guiterrez, deceased, could not maintain this suit or any suit for the recovery of damages caused by injuries resulting in the death of Antonio Gutierrez, but such suit could only be maintained under

the law by the widow, parents, or children of the deceased, and the court should have instructed the jury therefore for the defendant.

Second. The court erred in not giving special charge No. 1, asked by the defendant, wherein defendant requested the court to instruct the jury to find a verdict in its favor.

Third. Defendant further assigns as a fundamental error that the court erred in its general charge to the jury in instructing
39 the jury that they could return a verdict in favor of plaintiff, because, under no circumstances, was the plaintiff entitled to recover in this cause.

Fourth. Because the court erred in sustaining the exceptions of the Plaintiff contained in Plaintiff's first supplemental petition, filed on the 23rd day of November, 1907, to the amended answer of the defendant, wherein the territorial laws of New Mexico were plead.

Fifth. Because the court erred in sustaining the first exception contained in plaintiff's supplemental petition, to the effect that the laws of New Mexico plead by the defendant were superseded by the act of Congress, for the reason that said acts of Congress are unconstitutional and void.

Sixth. The court erred in sustaining the exceptions contained in paragraph 2 of plaintiff's supplemental petition, whereby plaintiff excepted to that portion of the answer of defendant pleading the laws of the Territory of New Mexico as a bar to a recovery.

Seventh. The court committed a fundamental error in the trial of this case in submitting to the jury, as the law in this case, what is known as the Federal Employer's Liability Act, because the same is unconstitutional and void.

Eighth. The court erred in not sustaining the defendant's motion for a new trial because the verdict was not supported by the testimony.

Ninth. The court erred in not sustaining defendant's motion for a new trial because the verdict is contrary to the testimony.

Tenth. The court erred in giving special instruction No. 3, requested by the Plaintiff.

Respectfully submitted.

HAWKINS & FRANKLIN &
W. B. WARE,
Attorneys for Defendant.

40 Endorsed: No. 6523. Enedina Guiterrez vs. El Paso & N. E. R. R. Co. Assignments of Error. Filed this 9th day of March A. D. 1908. I. Alderete, Clerk District Court, El Paso Co., Texas, J. I. Driscoll, Deputy.

In the District Court of the Forty-first Judicial District of the State of Texas for El Paso County.

ENEDINA GUITERREZ, Plaintiff,
vs.
EL PASO & NORTHEASTERN RAILWAY COMPANY, Defendant.

Def't's Additional Assignments of Error. Filed M'ch 19th, 1908.

Additional Assignments of Error Filed by the Defendant

Comes now the defendant in the above styled and numbered cause, and files the following assignments of error for revision and correction by the Court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas, Sitting at San Antonio.

First Additional Assignment of Error.

The court erred in rendering a judgment in favor of plaintiff Enedina Guiterrez for her personal use.

Respectfully submitted,

HAWKINS & FRANKLIN,
Attorneys for Defendant.

Endorsed: No. 6523. In the District Court 41st Judicial District of Texas. Enedina Guiterrez vs. El Paso & Northeastern Ry. Co. et al., Def'ts. Additional Assignments of Error. Filed this 19th day of March A. D. 1908. I. Alderete, Clerk District Court, El Paso County, Texas. L. M. Dunlap, Deputy.

41 THE STATE OF TEXAS:

No. 6523.

ENEDINA GUTIERREZ, Plaintiff,
vs.
E. P. & N. E. RY. Co., Defendant.

M —— ——

To Officers of Court, Dr.

The Costs accrued in the above entitled cause to adjournment of —— Term, 190–.

Revised Civil Statutes, Art. 1,401, amended so that oath in forma pauperis may be contested by officers of the court, and the issue tried as to ability of the party to give bond for costs.

Article 1,420*a* reads: It shall be lawful for Clerks of the District and County Courts and Justices of the Peace to demand payment

of all costs due in each and every case pending in their respective courts, up to the adjournment of each term of said courts.

Article 1,420*b* provides: Ten days after such demand the Clerk or Justice may place certified copy of Bill of Costs then due in the hands of the Sheriff or Constable for collection, which shall have force and effect of an execution. Taking an appeal does not interfere or suspend the right.

Article 1,420*c* authorizes levy and sale, but no costs or charges allowed for making out certified Bill of Costs or for collection unless levy is made.

Clerk's Fees.

		Dolls.	Cts.
	Citations & 3 copies P		2.25
	Notice to Serve Non-Residents		
	Issuing Writ Cit. Error & copy		1.25
	Cop. of Petition, with certificate and seal		
	Docketing Cause P		.20
	Docketing 3 Motions D		.45
	Filing 30 papers 17 D. 13 P		4.50
	Entering 2 Appearances 1-P. 1 D		.30
	Entering continuance 5 3 D. 2 P		1.00
	Entering 10 Order- and Judgment		7.50
	Swearing 6 Witnesses		.60
	Oath without Certificate		
	Oath with Certificate		
	Issuing 3 Subpœna- for Witness pl. 1 ad		.90
	Approving 2 Bond-		1.50
	Swearing and Empaneling Jury		.35
	Recording Verdict		.35
	Assessing Damages		
	Issuing precept to Serve Interrogatories P		.75
	Issuing Commission to take Depositions P		.75
	Cop. Interrogatories, with Certificates and Seals		
	Taking Depositions		
	Issuing Scire facias		
	Entering Interlocutory Judgment		
42	Entering Final Judgment		1.00
	Entering Words in Excess		
	Taxing Costs and Cop. thereof		.25
	Issuing Execution or Order of Sale		
	Issuing Attachment		
	Issuing Writ of Possession		
	Issuing Injunction		
	Issuing Sequestration		
	Issuing Garnishment		
	Issuing Writ of Error		
	Entering Sheriff's Return Execution		
	Copy of Petition for Writ of Error		
	Issuing Supersedeas		
	Final Record		

Transcript to Supreme Court D. 32 p.	19.20
Alias Execution and Return	
Issuing Writ of Judgment	
Entering Sheriff's Return	
Certificate	
Acknowledgment	
Total Clerk's Fees	43.10

Sheriff's Fees.

	Dolls. Cts.
Executing Writ and Cop. 3 Copies	3.25
Summoning 4 Witnesses	1.00
Serving Notice to take Deposition	
Executing Scire Facias	
Executing Attachment	
Executing Sequestration	
Executing Citation of Garnishment	
Executing Writ of Possession	
Jury Fees	.50
Levying Execution	
Returning Execution	
Taking Care of Property	
Executing and Returning Writ of Possession	
Executing and Returning Writ of Restitution	
Appraising	
Bill of Sale	
Posting Advertisement	
Total Sheriff's Fees	4.75
Jury Fee D	5.00
Witness Attendance	
Judge's Fees Stenog. Fees	3.00
Printer's Fees	
Attorney's Fees	12.75
Total Clerk's Costs	43.10
Total Costs	55.85

43 THE STATE OF TEXAS,
County of El Paso:

I hereby certify the above to be a correct account of the Costs in the above entitled and numbered suit, up to this date.

Witness my hand and Seal of said Court, affixed at office in El Paso, Texas, this 23rd day of M'ch, 1908.

Attest:

I. ALDERETE,
Clerk District Court El Paso County.
By L. M. DUNLAP, *Deputy.*

Clerk's Certificate.

THE STATE OF TEXAS,
County of El Paso:

I Isaac Alderete Clerk of the District Court of El Paso County, Texas, do hereby certify that the foregoing 32 Pages, not including this page or the cost bill is a true and correct copy of all the proceedings had and all papers filed in Civil Case No. 6523, wherein Enedina Gutierrez is Plaintiff and the El Paso & Northeastern Ry. Co. is Defendant, as the same appears now on file and of record in my office not including, however, the Duplicate Original Statement of Facts filed in said cause on the 2nd day of Jan'y A. D. 1908, and sent up with this record as a part hereof, and I further certify that the accompanying statement of Facts filed in said cause as above set forth is a duplicate of the original Statement of facts as the same purports to be, together with the index thereto placed upon said statement of Facts by me as Clerk of said District Court, at the request of the Attorney E. P. & N. E. Ry. Co., Defendant, and appellant in said cause, and to all of which I hereby certify.

Given under my hand and seal of said Court at City of El Paso, Texas, this the 23rd day of M'ch, A. D. 1908.

I. ALDERETE,
Clerk Dist. Court, El Paso Co., Tex.,
By L. M. DUNLAP, *Deputy.*

44–59 Transcript endorsed: No. 3980, El Paso & Northeastern Railway Company, Plaintiff in Error, vs. Enedina Gutierrez, Administratrix of estate Antonio Gutierrez, deceased, Defendant in Error. From the District Court, El Paso County. Applied for by Hawkins & Franklin, Att'ys for the Plaintiff on the 15th day of January, 1908, and delivered to Hawkins & Franklin on the 24th day of March 1908. I. Alderete, Clerk of the District Court, El Paso County. By V. F. Casseus, Deputy. Filed in Court Civil Appeals at San Antonio the 6th day of April, 1908. Jos. Murray, Clerk. No. 1933. Filed in the Supreme Court of Texas, Feb. 9th, 1909. F. T. Connerly, Clerk, by J. S. Myrick, Deputy. Judgment C. C. A. reversed—Judgment of District Court affirmed March 24, 1909. Rehearing overruled April 14th, 1909.

* * * * * * *

60 Proceedings in the Court of Civil Appeals at San Antonio, Texas.

Opinion.

Filed May 27th, 1908.

No. 3980.

EL PASO & NORTHEASTERN RAILWAY COMPANY, Plaintiff in Error,
vs.
ENEDINA GUTIERREZ, Administratrix, Defendant in Error.

Error from El Paso County.

This is a suit for damages arising from the death of Antonio Gutierrez, instituted by his widow, in the capacity of administratrix of his estate. In addition to general and special exceptions and other defenses, plaintiff in error alleged that Antonio Gutierrez was killed in New Mexico on June 22, 1906, that he was a resident citizen of the Republic of Mexico, that defendant in error was not a bona fide resident of Texas, as alleged by her, but was in El Paso, Texas, merely to attempt to give jurisdiction to the courts of El Paso County. A statute of New Mexico on the subject of personal injury and death claims in New Mexico was fully set up in the answer in which statute it was provided that the person injured or claiming damages for the death of another, shall within ninety days after the injuries were received, make and serve upon the guilty person or corporation, a certain affidavit, detailing various and sundry things, and providing that no suit should be brought after one year from time of the injuries and then only in the District Court of the Territory in which the injuries occurred. Exceptions to that portion of the answer were sustained by the trial court, and that action is the subject of the first assignment of error. This court has heretofore adverted to the provisions of that law as
61 being so unreasonable and outrageous as to deserve the condemnation of every civilized community, and has refused to be governed by it, at least in its application to the citizens of other States, and that refusal has met with the approval of the Supreme Court of Texas. Railway v. Sowers, 99 S. W. 190. We adhere to that decision, and approve the action of the court in striking out that part of the answer embodying its provisions. Since that decision and since the death, for which damages are herein claimed, occurred, the Congress of the United States has repealed the law in question, and few indeed will be found to regret its taking off.

Defendant in error instituted this suit, as administratrix of the estate of her deceased husband, alleging that they had no children, and her legal capacity to sue was not attacked, nor any defect of parties set up in the answer. Article 3023 Rev. Stats. authorizes suits of this character by an executor or administrator under certain circumstances, which may have existed in this case. Her au-

thority to sue was not questioned in the lower court and cannot be attacked here.

The fifth assignment of error is too general for consideration. It is not followed by a proposition.

The trial court submitted the case to the jury upon issues founded upon the Federal Employers' Liability Act of 1906, such as comparative negligence. That Act has been held unconstitutional and void by the Supreme Court of the United States in its application to the Territories as well as the States. Howard v. Railway, 207 U. S. 46; Railway v. Mills, (Tex. Civ. App.) 108 S. W. 480. The court erred in submitt*ed* the cause under that act. Railway v. Pickens, (Tex. Civ. App.) not reported.

62 The judgment is reversed and the cause remanded.

W. S. FLY,
Associate Justice.

Opinion delivered & filed May 27", 1908.

(Endorsed:) No. 3980. In Court of Civil Appeals, 4th Supreme Judicial District of Texas, San Antonio. El Paso & N. E. Ry. Co., Plaintiff in Error, vs. Enedina Gutierrez, Defendant in Error. From El Paso County. Opinion by W. S. Fly, Associate Justice. Filed in the Court of Civil Appeals, at San Antonio, Texas, May 27, 1908. Jos. Murray, Clerk. With App. No. 6017. Filed in the Supreme Court July 15, 1908, F. T. Connerly, Clerk.

Judgment.

WEDNESDAY, *May 27th, A. D.* 1908.

No. 3980.

EL PASO & N. E. RY. CO., Pl'ff in Error,
vs.
ENEDINA GUTIERREZ, Adm'x, Def't in Error.

Error from District Court, El Paso County.

This cause came on to be heard on the transcript of the record and the same being inspected, because it is the opinion of the court that there was error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be reversed and the cause remanded for further proceedings in accordance with the opinion of this court; that the defendant in error Enedina Gutierrez, Administratrix, pay all costs in this be-

63 half expended, and this decision be certified below for observance.

Motion for Rehearing by Defendant in Error.

Filed June 3rd, 1908.

In the Court of Civil Appeals, Fourth Supreme Judicial District of the State of Texas, at San Antonio, Texas.

EL PASO & NORTHEASTERN RAILWAY CO.
vs.
ENEDINA GUTIERREZ, Adm'r.

Motion for Rehearing by Defendant in Error.

Now comes the defendant in error in the above styled cause, and moves this court to set aside the judgment heretofore rendered in this cause reversing the judgment of the court below and remanding this cause to the court below for a new trial, and to affirm the judgment below, and presents the following grounds for this motion:

I.

This court erred in passing on the error in the charge of the court below as to comparative negligence and in reversing the judgment below for that error over the objections raised in the brief of defendant in error (page 10) to the 5th and 6th assignments of error of plaintiff in error to the effect that said assignments were too general—being directed against the entire charge of the court—to permit this court under the law and rules of court to consider the particular error in the charge as to comparative negligence.

Argument.

64 Defendant in error brings forward here again her insistance that defendant in error has rights under the statute and rules of the Supreme Court which appellate courts may not disregard without committing error. The assignments of error and brief of the plaintiff in error or appellant is on the same plane in the higher court in a general way as the pleading of the parties below. They are the pleading of the appealing party in the higher court, and should be specific and comply with law and rules of court, which are law under the Constitution, not only for the benefit of the court, but in order to apprise the opposing party of the specific points which he is to answer in the higher court. Like pleadings below, they are for the benefit of the court and litigants. The Appellate Court has no discretion when an appellee insists on her rights under the law governing assignments of error and the rules of court as to briefs, and should rule according to the law as shown by the decisions of this and other courts.

We believe that when no objection is made by an appellee or defendant in error it is then entirely a matter of discretion with the court. In Cammock v. Rogers, 73 S. W. 795, the Supreme Court

said in passing on a certified question, wherein the certificate did not show that appellee urged any objection to the assignments of error, that it was within the sound discretion of the Court of Civil Appeals to consider or not to consider such an assignment of error as was there presented. But the Supreme Court did not have before it or attempt to decide what rights, if any, an appellee might have under the rules if he seasonably urged objections.

Again, what is a "sound discretion?" What reasons suggest themselves to the court in this case which dispense with the enforcement of law and rules as to assignments of error and propositions and statements which differentiate it from a hundred cases wherein the rules we here invoke have been enforced in this and in
65 the other courts of appeal and in the Supreme Court? It seems to us that even when it is discretionary it is a judicial discretion and not an arbitrary power, and we do not suppose this court so considers it an arbitrary power, but agrees with us that when it is exercised in favor of an appellant in a case it should be based upon considerations which differentiate this case from the great majority of the cases wherein the rules are enforced. Reasons may exist in the mind of the court in this case for refusing to enforce the rules here but as nothing is said in the opinion on these practice questions, the writer is unable to understand why the judicial discretion, if it exists, was exercised against defendant in error. It seems to us that injustice is done the defendant in error in permitting plaintiff in error to avail itself of questions which were never presented to the court below and which might have been sustained by the court below so that defendant in error could have taken steps to enforce her rights in New Mexico before they were barred by limitation. Now defendant in error is confronted with a New Mexico death statute fixing a specific sum of recovery as a forfeiture or penalty, which has been held to have no extra-territorial operation. Case v. St. Louis Transit Co. 91, S. W., 419. She is now too late to sue in New Mexico. Under these circumstances, which the court could at least infer might arise under the ruling in Mex. Nat. Ry. Co. v. Jackson, 89 Tex. 107, if the plaintiff in error is allowed to succeed in setting aside the judgment below it is placed where it may defeat a just right of recovery by pleading limitation in New Mexico. If the court cannot consider these facts as before it, it may at least see from the record that upon another trial plaintiff below will have to rely upon New Mexico law for a recovery, and that this court cannot know that the New Mexico law is of such similarity to ours as that under the Jackson case it could be administered in Texas courts.

66 If the court has a discretion to consider or to refuse to consider points not properly raised, these considerations, it is hoped, may appeal to the court to exercise its discretion against considering assignments of error or questions of law or fact which the court is not bound to consider under the rules.

The Third Court of Civil Appeals after certifying the assignments of error in question in Cammock v. Rogers, 74 S. W. 945 to the Supreme Court without stating in the certificate that appellee raised

any objection to the assignment, and after receiving an answer that it was within the sound discretion of the Court of Civil Appeals to consider or to refuse to consider the assignments exercised the discretion against considering the assignment. Cammack v. Rogers, 74 S. W. 945. These observations will apply to other questions hereinafter considered as to the questions raised for consideration.

The charge as to comparative negligence in no manner refers to the act of Congress. The existence of the Act of Congress does not make the situation worse than if there had been no Act of Congress relating to the subject. If there had been no such Act, and the court below had given such a charge as was given on comparative negligence, then clearly under the well settled constructions by this court and other courts of civil appeals and the Supreme Court an appellant could not have had reviewed this particular objection under a general assignment of error in the charge of the court without pointing out any specific error. Ross v. Moskowitz, 100 S. W. 768; San Antonio Traction Co. v. Sanchez, 84 S. W. 849.

The syllabus of the case of Ross v. Moskowitz reads as follows:

"The Supreme Court will not determine whether an entire charge given in a civil action was correct wherein the only assignment of error complaining of it, the entire charge was alleged to be erroneous, and there was no proposition stating the particular instruction complained of."

67 In the San Antonio Traction Co. case (84 S. W. 849) this court speaking through the same justice who wrote the opinion in the case at bar held as shown by the syllabus:

"Where an assignment of error complains of a clause in a charge, but neither the assignment of error, nor the proposition thereunder points out the error, the assignment presents nothing for review."

The only assignments of error on the charge are the fifth and sixth, as numbered in brief of plaintiff in error, pages 12 & 13, of its brief. The fifth merely affirms without stating any reason therefor, that under no circumstances was plaintiff below entitled to recover; nor is it followed by any proposition of law stating any reason for the conclusion affirmed.

The sixth assigns error "in submitting to the jury as the law of this case what is known as the Federal Employers' Liability Act, because the same is unconstitutional." The court nowhere referred to that Act in the charge. The charge in the main was not based on that Act but presented the general doctrines as to negligence &c., and it does not appear in the charge that the court took the comparative negligence propositions from that Act. Hence to assign error in giving in charge that Act, which was not mentioned in the charge, does not point out any error. The assignment should have been addressed to some specific error of law in the charge, stating the particular error. The assignment says there was error because said Act was unconstitutional, but no reason is stated why it is unconstitutional. The decisions as to its unconstitutionality have no reference to the comparative negligence doctrine, but relate alone to the powers of Congress over interstate commerce. But this court is not authorizd to take any notice of its decisions or the decisions of any

other court as to a point sought to be raised in determining
68 whether a point is or is not properly raised in this case. A look at the authorities, even the most recent decisions of this court comes later—after the court has first determined that the question is properly raised for decision.

II.

This court erred in treating as fundamental error or error apparent of record, if the court so held the charge of the court below on comparative negligence, and in thereupon without an assignment of error on that part of its charge, holding that that part of the charge constituted reversible error.

Argument.

The only error in the charge against plaintiff in error was the instruction that plaintiff below might recover notwithstanding her husband may have been guilty of negligence which contributed to his injury and death. This being given against defendant below, the instruction for abatement of damages based on contributory negligence, if any existed, was favorable to defendant below, whether or not the charge that plaintiff might recover notwithstanding contributory negligence was even injurious error depends upon whether the record shows that there was contributory negligence or some evidence of contributory negligence upon which the jury might have found there was contributory negligence. If there was not, then the court might properly have omitted any charge on contributory negligence, and the giving of this charge was prejudicial only to the plaintiff below in that it treated contributory negligence as an issue in the case when it was not.

Therefore, to bring to the attention of this court that said charge was even injurious error the plaintiff in error was bound to make a proposition in his brief that it was injurious error and support
69 this by such statement of the evidence from the statement of facts as would show the injury plaintiff in error suffered. The statement of facts shows without conflict of evidence that deceased was obeying instructions of his superiors in attempting to move shovels from one car to another when the cars were running about six miles an hour and about to make a running switch, and as he was about to step from one car to another the brakeman, who among others told deceased to do this service, uncoupled the car deceased was stepping from, and the one he was about to step on ran out of his reach while he was in the act of stepping onto it. He fell and was run over and killed. It does not appear that any harm would have come of his obeying orders and crossing from one car to another if the brakeman standing right at him, and who with the superintendent of the work train told deceased to do this, had not uncoupled the cars when deceased was endeavoring to pass over. The attempt to cross, if negligence, when done under instructions, was not the proximate cause of the injury. That negligence would probably have neither caused nor contributed to an accident. The proximate cause of the injury was the uncoupling of the cars. Be-

sides, there was uncontradicted evidence of discovered peril, and the court charged on that phase of the case. The defense did not adduce any evidence on the trial, and the plaintiff's case showed an unmistakable case of discovered peril. The brakeman was standing in three feet of the deceased with his face towards deceased, and uncoupling the cars by means of a bar at the side of the car; the car having automatic couplers which were uncoupled by movement of an iron bar on the side of the car outside of the rails. The brakesman, among others, told deceased to bring forward the shovels. This brakesman knew the deceased was there to cross with the shovels, and without warning uncoupled the cars as he was at the
70 end of one and about to step to another, whereby he fell to the track and was run over and killed. This was plaintiff's evidence given by several witnesses. There were no witnesses examined by defendant or other evidence adduced. Under this testimony the court below might well have omitted any charge on contributory negligence, and if this might have been done, then there was no error of which plaintiff can complain in the charge as to comparative negligence. It devolved on plaintiff in error to show that the charge on contributory negligence was injurious by a proposition and statement. In no event can this court say that this charge was error apparent of record or fundamental error.

III.

The court erred in sustaining the second assignment of errors as numbered in the brief (pages 10-11) over the objection of defendant in error raised in her brief (Page 10) that it announces no proposition of law and is not followed by any proposition of law, and in holding the Act of Congress mentioned unconstitutional in support of said assignment of error, without that question being presented in the brief as is required by the rules which are law.

Argument.

This assignment though not based on any ruling of the court below that the law was unconstitutional, is the only assignment which comes anywhere near presenting the constitutional question. It fails to raise the question because it predicates error on the alleged holding of the court below that the New Mexico law was superseded, which is an immaterial ruling if the New Mexico law was ineffectual to prevent the suit in Texas whether superseded by an Act
71 of Congress or not, as this court has held in this case. This assignment simply says the ruling as to the New Mexico statute was error, and states as an assumed reason that the Act of Congress was unconstitutional. No provision of the Constitution which it is supposed to violate is referred to, and no reason is stated why it is unconstitutional, and hence, though if it is specific enough for an assignment of error the assignment should fail because it is not followed by any proposition of law showing the reason why the law is unconstitutional. The rules as to preparing a case for hearing in this court are not changed because it is fresh in the mind of the court and counsel that this court has recently held said Act of Con-

gress unconstitutional as applied to the territories, which we respectfully submit is in our opinion the first decision of any court to that effect. A writ of error from the Supreme Court will lie in this case if a rehearing is not granted, notwithstanding the reversal and remanding of this cause. The writ will lie on the ground that the constitutionality of an Act of Congress is passed upon, and defendant in error, we believe is entitled to insist in this court and in the Supreme Court on questions not being decided which are not properly raised for decision, notwithstanding this court is familiar with the question it decides.

IV.

The court erred in sustaining the second assignment of error as numbered in the brief, and in overruling the counter-proposition of defendant in error and in holding that the Act of Congress in question was unconstitutional in sustaining said assignment, when no question as to its constitutionality was raised in the court below or ruled on in the court below.

Argument.

This court has decided in this case that the court below in sustaining the exceptions of the plaintiff below held the New
72 Mexico statute which defendant pleaded to be ineffectual against the right of plaintiff to sue in a Texas court, and this court sustains that ruling of the court below. Accepting this interpretation of the ruling as a correct interpretation of what the court below meant in sustaining said exceptions we find that that may have been all that the court below decided in sustaining said exception, and that the ruling on the exceptions which assailed the New Mexico law on two grounds, aside from the effect of the Act of Congress, did not necessarily include any ruling on the suggestion made in the same exceptions that the New Mexico law was superseded by the Acts of Congress, which exception referred to no particular Act. It does not, therefore, appear from the record that the court below ruled even on the suggestion that the Acts of Congress superseded the New Mexico statute. Neither would this suggestion if directed specifically to the particular Act of Congress in question have raised any constitutional question.

That an appellate court should not permit a constitutional question to be raised for the first time on appeal, we maintained by numerous authorities in our brief on file in support of our counter-proposition, page 11 to 23 of our brief. We noted the difference between the appellate court reversing without an assignment of error as fundamental error, a ruling which was in fact made by the court below, and a ruling in the appellate court on a proposition or question which was never in fact ruled on, or ruling thereon refused in the court below. The former is the exercise of appellate jurisdiction; the latter is the exercise of original jurisdiction.

V.

If this court meant to hold or shall hold that the constitutionality of the Employers' Liability Act was ruled on by the court below,

then defendant in error says that such ruling if made is not
73 assigned as error, but the unconstitutionality of said Act is merely incidentally affirmed without pointing out any ruling of the court below as error in the first and second assignments of error directed specially to the ruling of the court below in sustaining exceptions to the plea of the restrictive New Mexico statute, which exceptions were directed against that law on three grounds and raised no question as to the constitutionality of the Act of Congress in question, and that this court therefore, erred in passing on said constitutional question and in reversing and remanding this cause upon a decision that said Act of Congress was unconstitutional as applied to the territories of the United States unless the manner in which the constitutional question arose, if it arose at all, and affected the case, presents a fundamental error or error apparent of record within the meaning of the statute governing assignments of error.

VI.

If this court held that in this cause of action said Act of Congress was pleaded as the basis of the action and that the action defended alone upon it, and that therefore, the sustaining of the cause of action by the court below presents for review a fundamental error or error apparent of record, this court erred in so holding and in reversing and remanding this cause, for that reason, because it is not true that the cause of action appears from plaintiff's petition to be based on said Act, or that the existence of said Act was at all necessary to the existence or maintaining of said cause of action; the cause of action being pleaded in plaintiff's petition without mention of said Act, and consisting of allegations of a cause of action under the death statute of Texas, for a death caused by negligence of the defendant. There being no pleading or proof, of the death statute of New Mexico, the case was triable upon the pre-
74 sumption that their statute as to negligent injuries resulting in the death was the same as the Texas statute on that subject. This being true, the case was made out so as to stand either upon the death statute of Texas or the Act of Congress, and either being valid, the unconstitutionality of the other in no manner affected the case injuriously to either party in so far as the pleading of the case in plaintiff's petition is to be considered.

The charge of the court on contributory negligence when that issue was not in the case, made the charge on that subject injurious to the plaintiff below rather than the defendant below. Wherefore, no fundamental error is apparent, and defendant below not being entitled to any charge on contributory negligence and not having specifically assigned as error, that part of the charge relating to contributory negligence, or made any proposition of law as — that particular error, if injurious error it was against defendant below, this court erred in passing on the constitutionality of said Act of Congress and in reversing and remanding this cause because of such holding.

VII.

The defendant below having invoked, and thereby affirmed the constitutionality of the Employers' Liability Act in its motion for a new trial in the court below it cannot be heard on appeal to change positions and assail the constitutionality of said Act.

On page 12 of brief of defendant in error the paragraph of the motion for new trial affirming the effective application of the Act of Congress and invoking a ruling thereon will be found with reference to page — of transcript where it may be found.

VIII.

The provisions of the Act of Congress known as the Federal Employers' Liability Act governing those engaged in commerce
75 in the territories and in the District of Columbia, are severable from the provisions on the other subjects, and are constitutional under the authority of Congress to legislate for the territories and the District of Columbia, although the provisions depending for their constitutional support on the power of Congress to regulate interstate commerce are unconstitutional, and this court erred in holding said Act unconstitutional and in reversing and remanding this cause for that reason.

In addition to the argument heretofore made on the constitutionality of the Employers' Liability Act, we respectfully refer the court to the Congressional construction of the opinion of the Supreme Court of the United States, which construction is shown by the 8th and last section of the new Employers' Liability Act, which reads as follows:

SEC. 8. That nothing in this Act shall be held to limit the duty or liability of common carriers or to impair the right of their employés under any Act or Acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the Act of Congress entitled 'An Act relating to liability of common carriers in the District of Columbia and territories, and to common carriers engaged in commerce between the states and foreign nations to their employés,' approved June 11, 1906.

As that Act was certainly nullified rightfully or wrongfully, as to interstate commerce carriers by the decision of the Supreme Court of the United States, we can only understand from this section that Congress believed that Act was still in force in the territories and in the District of Columbia. While this Legislative construction is not binding on the courts, it may be looked to by the court as persuasive and entitled to great weight in passing on this question.

Defendant respectfully submits that this court should grant
76 her a rehearing and set aside the judgment rendered in this cause reversing the judgment of the court below and remanding this cause for a new trial and render judgment herein affirming the judgment of the court below.

The attorneys for plaintiff in error are W. A. Hawkins and John Franklin, partners under the firm name of Hawkins & Franklin, and as such firm appear in this cause. Their personal and firm post

office address is El Paso, Texas. The post office address of counsel for defendant in error, F. G. Morris, is El Paso, Texas.

F. G. MORRIS,
Attorney for Defendant in Error.

We accept service of the within motion for rehearing and waive all further or other service.

HAWKINS & FRANKLIN,
Att'ys for Plaintiff in Error.

June 1, 1908.

(Endorsed:) No. 3980. Motion 4547, El Paso & Northeastern Ry. Co. Plaintiff in Error vs. Enedina Gutierrez, Adm'x, Defendant in Error. Motion for rehearing by defendant in error. Filed in the Court of Civil Appeals at San Antonio Texas, June 3, 1908. Jos. Murray, Clerk. With App. No. 6017. Filed in Supreme Court July 15, 1908, F. T. Connerly, Clerk.

Order Overruling Motion for Rehearing.

Wednesday, June 17th, 1908.

No. 3980.

EL PASO & N. E. RY. CO., Pl'ff in Error,
vs.
ENEDINA GUTIERREZ, Def't in Error.

From El Paso County.

77 The motion of defendant in error for a rehearing filed June 3rd, 1908, coming on to be heard and the court having duly considered the same it is ordered that said motion be and it is hereby overruled; it is further ordered that the defendant in error, Enedina Gutierrez, Administratrix pay all costs of this motion.

Opinion on Motion for Rehearing by H. H. Neill.

Filed June 17, 1908.

No. 3980.

EL PASO & NORTHEASTERN RY. CO., Appellant,
vs.
ENEDINA GUTIERREZ, Administratrix, Appellee.

On Motion for Rehearing.

It is apparent from the record in this case that it was tried upon the theory that the Employers' Liability Act was valid and should control its disposition; for it was upon this theory that the Court

sustained the plaintiff's exceptions to that part of defendant's answer, in which was pleaded the failure of the plaintiff to present her claim for damages in the manner and within the time prescribed by the statute of the territory of New Mexico.

In Sawyer v. El Paso & N. E. Ry. Co., 108 S. W. 719, we held that such provision of the Act just referred to was valid and that the presentation of the notice of a claim for damages in accordance with it was a condition precedent to a cause of action of this character. The majority of the Court adhere to that ruling, and now hold that the trial court erred in sustaining plaintiff's exceptions to the part of defendant's answer which pleaded said Act and plaintiff's failure to present her claim in accordance with it.

This error only affords another ground for reversal of the judgment.

78 The motion is overruled.

____ ____,
Associate Justice.

(Endorsed:) No. 3980. In Court of Civil Appeals 4th Supreme Judicial District of Texas, San Antonio. El Paso & N. E. Ry. Co. Appellant vs. Enedina Gutierrez, Adm'x Appellee. From El Paso County. Opinion on motion for rehearing by H. H. Neill, Associate Justice. Filed in the Court of Civil Appeals at San Antonio, Texas, June 17, 1908. Jos. Murray, Clerk. With App. No. 6017. Filed in Supreme Court July 15, 1908, F. T. Connerly, Clerk.

Dissenting Opinion by W. S. Fly.

Filed June 18, 1908.

No. 3980.

El Paso & N. E. Ry. Co., Appellant,
vs.
Enedina Gutierrez, Appellee.

Dissenting Opinion.

I adhere to the original opinion of this court in this case. I believe that the different parts of the act of the territory of New Mexico are so blended that the whole act must be declared unconstitutional and void. This Court has declared portions of it not binding on the courts of Texas, and the Supreme Court of Texas has approved that declaration. Railway v. Sowers (Tex. Civ. App.) 99 S. W. 190. The provisions of the act are so repugnant to the principles of right and justice that the Congress of the United States repealed it, without a dissenting vote, and in so far as the case of Sawyer v. Railway upholds that act it should be overruled. I dissent from the opinion delivered on rehearing by a majority of the Court, except as to the result.

W. S. FLY,
Associate Justice

79 (Endorsed:) No. 3980. In Court of Civil Appeals 4th Supreme Judicial District of Texas. El Paso & N. E. Ry. Co. Appellant vs. Enedina Gutierrez, Appellee. From El Paso County. Dissenting opinion by W. S. Fly, Associate Justice. Filed in the Court of Civil Appeals at San Antonio, Texas, June 18, 1908. Jos. Murray, Clerk. With App. No. 6017. Filed in Supreme Court, July 15, 1908. F. T. Connerly, Clerk.

Additional Motion for Rehearing and for Findings of Facts.

Filed June 24, 1908.

In Court of Civil Appeals Fourth Supreme Judicial District of Texas at San Antonio.

No. 3980.

EL PASO & N. E. RY. CO.
vs.
ENEDINA GUTIERREZ, Adm'r'x.

Now comes the defendant in error, Enedina Gutierrez, admrx., in the above styled and numbered cause, and makes this her additional motion for a rehearing in said cause, and now moves the court to set aside the judgment heretofore rendered in this cause, reversing the judgment of the court below and remanding this cause for a new trial and to affirm the judgment of the court below, and herein adopts all the grounds of her former motion for a rehearing filed herein and in addition thereto (because of the change of ruling made by this court on motion for rehearing, thereby introducing a ruling into the case which was not made on former motion for rehearing), the defendant in error makes as additional ground for this motion for rehearing the following:

1. Because the court erred in its ruling on motion for rehearing to the effect that the law of New Mexico pleaded by the plain-
80 tiff in error in the court below was valid in as far as it required this defendant in error to give such notice of her claim for damages as was required by said law and in holding that the court below erred in sustaining the exceptions of defendant in error to that part of said law of New Mexico.

2. This defendant in error moves the court to prepare and file in this cause its findings of facts, for the reason that defendant in error desires to make application to the Supreme Court of this State for a writ of error and shows to this court that a writ of error to the Supreme Court will lie because of the fact of disagreement among the judges of this court in the decision of this cause, because also there is involved in the decision a determination as to the application of the Constitution of the United States and an Act of Congress to this cause, and further, because the decision in this cause practically settles the case.

F. G. MORRIS,
Attorney for Defendant in Error.

We the undersigned, attorneys for the plaintiff in error, accept service of the foregoing additional motion for rehearing and waive all other and further service thereof, and it is agreed by and between the attorneys for the plaintiff in error and attorney for the defendant in error that this additional motion for rehearing may be filed, submitted and acted upon at once without further service and without the delay of five days, which would otherwise be required by law before the same could be acted upon.

HAWKINS & FRANKLIN,
Attorneys for Plaintiff in Error.
F. G. MORRIS,
Att'y for Defendant in Error.

(Endorsed:) No. 3980. Motion 4568 El Paso & N. E. Ry. Co. vs. Enedina Gutierrez, Adm'x. Additional motion for rehearing and for findings of facts. Filed in the Court of Civil Appeals at San Antonio Texas, June 24, 1908. Jos. Murray, Clerk. Filed in Supreme Court, Feb. 9, 1909. F. T. Connerly, Clerk.

81 *Order Overruling Additional Motion for Rehearing.*

WEDNESDAY, *June 27th, A. D.*, 1908.

No. 3980.

EL PASO & N. E. RY. CO., Pl'ff in Error,
vs.
ENEDINA GUTIERREZ, Def't in Error.

Error from El Paso.

The motion of defendant in error for rehearing and findings of fact, coming on to be heard, and the court having duly considered the same, it is ordered that said motion be and it is hereby overruled; that the defendant in error, Enedina Gutierrez, Administratrix pay all costs of this motion.

82 PROCEEDINGS IN THE SUPREME COURT OF TEXAS, AUSTIN.

Application for Writ of Error.

Filed July 15, 1908.

In the Supreme Court of the State of Texas.

ENEDINA GUTIERREZ, Adm'r'x, Plaintiff in Error,
vs.
EL PASO & NORTHEASTERN RAILWAY CO., Defendant in Error.

Judgment reversed and cause remanded by the Court of Civil Appeals for the Fourth Supreme Judicial District at San Antonio, and defendant in error's motion for rehearing overruled May 17,

1908; additional motion for rehearing filed upon change of ruling on overruling motion for rehearing on one question overruled, June 27, 1908.

Application for Writ of Error.

To the Honorable Supreme Court of the State of Texas:

Your petitioner, Enedina Gutierrez, Administratrix of the estate of Antonio Gutierrez deceased, respectfully represents that in the above styled and numbered cause on the 27th day of May, 1908, the Court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas, at San Antonio, Texas, reversed and remanded said cause, and thereafter within less than fifteen days from the date of said judgment, Enedina Gutierrez, adm'r'x, defendant in error in said court, filed her motion for a rehearing therein in said Court of Civil Appeals, which application was by said court overruled
83 on June 17, 1908, with a change of ruling on one material question in the case so as to rule against the defendant in error and contrary to the original opinion delivered in said cause, whereupon defendant in error therein, who is the plaintiff in error in this court, filed her additional motion for rehearing on June 24, 1908, which additional motion for rehearing was overruled by said Court of Civil Appeals on the 27th day of June, 1908.

Petitioner further represents as grounds for this application for writ of error in this cause wherein the judgment of the court below was reversed and the case was by the judgment remanded to the court below for a new trial:

First. That this is a case wherein is involved the construction and application of the Constitution of the United States and of an Act of Congress, in this, that the plaintiff below, Enedina Gutierrez, adm'r'x instituted this suit for damages for the death of her husband, Antonio Gutierrez, whose death it was alleged was caused by negligence of the servants and employés of the defendant railroad company in the Territory of New Mexico on the 22nd day of June, 1906; the allegations of plaintiff's petition being such as to bring the case under the Act of Congress of the United States entitled "An Act Relating to Liability of Common Carriers in the District of Columbia and Territories, and common carriers engaged in commerce between the states and between the states and foreign nations to their employés." Approved June 11, 1906. That defendant below pleaded in bar of said action a certain statute of the Territory of New Mexico which provided among other things that no cause of action should arise at common law or under any statute of said Territory in favor of a person for personal injuries or death caused by a corporation or others unless within ninety days after such injury and thirty days before filing suit therefor notice of the nature of plaintiff's claim should be sworn to in New Mexico and
84 served on the defendant and until a suit should be brought on said claim in a territorial court of the Territory of New Mexico, and forbidding the institution of suits elsewhere.

The plaintiff below, plaintiff in error here, in her first supple-

mental petition demurred to said plea by defendant upon the grounds,

1. "Because said statute pleaded by defendant was superseded by the Acts of Congress.

2. "Because said territorial laws, in so far as they deny the right to sue in Texas for injury occurring in New Mexico, and in so far as they require a person having a cause of action for injuries occurring therein to make a trip to New Mexico, were unconstitutional and void," having reference of course, to the Constitution of the United States, as that was the only Constitution by which the constitutionality of legislative acts of a territory could be governed.

The trial court sustained the demurrer without indicating whether or not each of the objections was sustained or if not upon what particular ground of the demurrer the ruling was based.

The trial court instructed the jury on the general doctrines of negligence which would have been applicable either with or without the Act of Congress except as to the rule of comparative negligence established by the Act of Congress mentioned, which the trial court gave fully in its charge to the jury, in accordance with the said Act of Congress. Plaintiff in the trial court and now plaintiff in error recovered a verdict and judgment for $3,500 and defendant in the trial court sued out a writ of error to the Court of Civil Appeals.

The Court of Civil Appeals held that the Act of Congress above referred to was unconstitutional in its application to the territories as well as the states, and based its reversal of the judgment
85 below on that ruling; but, in its original opinion, sustained the action of the trial court in sustaining exceptions to the plea of the restrictive statute of New Mexico and reversed and remanded the case for a new trial unaffected by the Act of Congress or said New Mexico statute denying a right to sue elsewhere than in New Mexico, and requiring a person injured, if not living there, to make affidavit as to his claim and names and residences of witnesses &c. as a condition precedent to instituting a suit in New Mexico. In ruling on the motion for rehearing filed by defendant in error in the Court of Civil Appeals, which did not bring in question the ruling of the Court of Civil Appeals sustaining the action of the trial court as to the restrictive statute of New Mexico, the majority of the court of its own motion so changed the ruling of that court as to said New Mexico statute as to hold that provision of it requiring affidavit of claim and list of witnesses, &c. to be served on defendant to be valid and enforceable in the courts of Texas, Mr. Justice Fly, dissenting on that ruling. And now this plaintiff in error shows to the court that this is a case which involves a construction of the Constitution of the United States, first in its application to the Act of Congress in question in order to determine whether the power given Congress to regulate commerce between the States, in its application to the Act of Congress which attempts to regulate all carriers engaged in commerce between the states in their relations to all of their employés and of all their employés to them, with respect of injuries and death resulting from negligence,

and involves a construction of said Act of Congress in order to determine whether it relates to all of such employés or only to employés when actually engaged in handling interstate commerce, and if said Act is unconstitutional as applied to commerce be-
86 tween the states, then a construction of it to determine whether its provisions as to territories are severable from the unconstitutional parts, and are such as Congress would probably have passed without the unconstitutional parts if it had known the other parts were unconstitutional, and is therefore valid as to the territories or whether it is not severable or not such as that Congress would have passed it for the territories and District of Columbia; and secondly, in that the case involves a construction and application of the 14th Amendment of the Constitution of the United States in its application to that part of the statute of New Mexico which attempts to deny to a person injured through negligence of a common carrier or others in said territory a right of action for such injury he shall bring suit therefor in New Mexico and unless he or she will incur the expense and labor of a trip to New Mexico, if not residing there, to make an affidavit before an officer of New Mexico as is required by said New Mexico statute; plaintiff in error asserting propositions in her brief to show that a right of action for injuries to one's person like injuries to his property is guaranteed by said constitutional amendment against legislation attempting to destroy it or to prevent it from arising or burdening it with onerous and expensive conditions precedent, and that this New Mexico statute being void for said constitutional reasons as to persons who survive such injuries, will not be given effect alone as to death cases such as this, because its provisions are not severable so as to apply to death cases alone, and because it cannot be held that the legislature of New Mexico would have passed it to apply to death cases alone. And further, that because said statute is void as to its provisions restricting the bringing of suits elsewhere than in New Mexico, the provision as to notice being applicable alone to a suit in
87 the courts of New Mexico, which it alone permitted, is so blended with the unconstitutional part as held by Associate Justice Fly that the provision as to notice must fall with the other part of the statute. If it be said that the words in Revised Statutes, Art. 941 Sub. Div. 2, "Construction and application of the Constitution of the United States or of the State of Texas, or of an Act of Congress" do not as applied to the state Constitution embrace a question as to the validity of a state statute, because that subject is specially provided for in subdivision 3 of said article it does not follow that the words "construction and application of the Constitution of the United States * * * or of an Act of Congress" do not include a question of the constitutionality of an Act of Congress as well as a construction of the Federal Constitution and of an Act of Congress. For, while the Constitution of Texas is full of legislation, so that questions as to its application may arise over its self-operative parts without necessarily involving any question as to the constitutionality of a state statute, yet this is not true of the Constitution of the United States. It has no legislative provisions. It delegates

certain powers to Congress and thereby limits the powers of Congress to those expressly or impliedly delegated. It expressly denies certain powers to states. And no construction or application of the Constitution of the United States can be imagined which will not bring in question the constitutionality of an Act of Congress or a law of a state. Hence these words must refer to questions as to the constitutionality of Acts of Congress and state statutes when referring to the Constitution of the United States, or they have no place or field of application.

Second. As a second ground for the Supreme Court taxing jurisdiction of an application for a writ of error in this case notwithstanding the judgment of the court below was reversed and
88 the cause was remanded for a new trial, your petitioner shows to the court that this is a case in which the judges of the Court of Civil Appeals have disagreed in that in the opinion of the majority of said judges which constitutes the authoritative opinion of said court as changed on motion for rehearing, it is held that that part of the statute of New Mexico pleaded by defendant in the trial court which requires an affidavit made in New Mexico as to the claim and list of witnesses, their residences &c., is valid; and, hence, if no writ of error is granted in this case the court below acting under the majority opinion will be required on another trial to require plaintiff to show that such notice list of witnesses &c. was furnished defendant within the time required by said New Mexico statute, and if plaintiff is unable to make that showing to instruct a verdict for defendant; whereas Mr. Justice Fly of said court, held that because said New Mexico statute was invalid in so far as it denied the right to sue elsewhere than in New Mexico on transitory causes of action arising in New Mexico, and because it was so blended in its provisions that the whole act was unconstitutional and void.

Wherefore, your petitioner now applies to the Supreme Court for a writ of error to the end that said court may review the said cause and action of the Court of Civil Appeals therein, and correct such action, and as reasons and grounds for the granting of such writ of error, your petitioner assigns the following errors committed by the Court of Civil Appeals in reversing said judgment and remanding said cause, and in refusing a rehearing, towit:

I.

The Court of Civil Appeals erred in passing on the constitutionality of the Employers' Liability Act of Congress in this case and in holding it to be unconstitutional over the objections of
89 the defendant in that the question as to the constitutionality of said Act was not raised or ruled on in the court below or properly presented for consideration in the Appellate Court by assignment of error, proposition or statements showing an erroneous ruling thereon, or that, in so far as the court below applied some of the provisions of said Act in its charge, such part of the charge was error apparent of record or fundamental error, or that there was error which was injurious to defendant in the trial court.

Statement.

The defendant in error in the Court of Civil Appeals, (plaintiff in error here) made specific objections to assignment of error, proposition and statements, and for lack thereof in brief, from page 6 to 13.

The first assignment of error as numbered in the brief of the plaintiff in error in the Court of Civil Appeals (Sixth in transcript) is as follows:

"The court erred in sustaining the exceptions contained in paragraph two of plaintiff's supplemental petition, whereby plaintiff excepted to that portion of the answer of defendant pleading the laws of the Territory of New Mexico as a bar to a recovery." (Page 6 Brief of Plaintiff in Error in Court of Civil Appeals.)

There were three propositions contained in the exceptions to which this assignment is directed, one of which asserting that the law of New Mexico pleaded was superseded by Acts of Congress, which raised a question as to implied repeal of New Mexico law, and the other two raising two separate constitutional questions against the validity of the laws of New Mexico pleaded, wholly aside from any act of Congress. The assignment of error is an omnibus assignment of error as to the ruling on all of said propositions in-
90 volving the three separate propositions of law and it is not specific. The objections to the New Mexico law alluded to are to be found correctly quoted in the brief of plaintiff in error in the Court of Appeals (defendant in error in the Supreme Court), page 8.

There is no proposition of law following this assignment stating or affirming any proposition of constitutional law, but merely by way of recital the legal conclusion is announced that the Act of Congress in question was unconstitutional without stating the proposition of constitutional law involved. (Page 7 of brief.)

The second assignment of error in brief (5th in transcript) says: "the court erred in sustaining the first exception contained in plaintiff's first supplemental petition to the effect that the laws of the Territory of New Mexico pleaded by defendant were superseded by said Acts of Congress, for the reason that said Acts of Congress were unconstitutional and void." (Brief p. 10-11.)

No particular Act of Congress is referred to, and hence no ruling on the Employers' Liability Act is specifically assigned as error. This assignment does not affirm any proposition of constitutional law and may as well refer to a contention that the territorial laws should be so construed as not to be in conflict with the Acts of Congress referred to, whatever they were, as to be taken as raising a constitutional question. This assignment does not state a proposition of law and no proposition of law is made under it.

The 3rd assignment (Brief p. 11), as numbered in the brief, (4th in transcript) is subject to the same objection as covering several propositions as the 1st assignment as numbered in brief.

The 6th assignment as numbered in the brief (p. 13) assigns error "in submitting to the jury as the law in this case what is known as the Federal Employers' Liability Act, because the same

is unconstitutional." No particular part of the charge is
91 named as giving in charge any rule of law prescribed by said Act. This assignment announces no proposition of law and is not followed by a proposition of law. The charge did not expressly refer to the Employers' Liability Act; and the only way to make a specific assignment on the charge was to identify the objectionable part, if any, that could not be given except it be taken from that Act. No part of the charge required that Act to sustain it except the part giving the rule as to comparative negligence, and there is no assignment of error as to this part of the charge. In order to show that this part of the charge was even injurious error, a statement of the evidence should have been given so as to show whether or not there was any evidence tending to show contributory negligence. If not, the charge was not injurious to defendant below but was injurious to plaintiff below.

In the case of Kilgore v. N. W. T. Educational Association, 90 Tex. 141, this court refers to its examination of the statement of facts to see whether or not a certain erroneous charge was injurious to the party complaining. If that is done in this case it will not appear that the charge of the doctrine of comparative negligence was even injurious to defendant below. It appears that the deceased was acting under instructions of the foreman in crossing from one car to another while the train was moving very slowly, and it does not appear that the proximate cause of the injury was the attempt to cross from one car to another, but that the cutting of the cars apart when deceased was in the act of crossing from one car to another was the proximate cause of the injury and death. Furthermore, it was a plain case of discovered peril. The plaintiff below made her case by testimony of her witnesses which was uncontradicted.

The defense offered no evidence. No other assignment of error raises any constitutional question or objection to the charge.
92 The constitutional question is unimportant in the case except in considering the charge, as the pleading was good under either the Act of Congress or the New Mexico death statute; presuming it to be the same as the Texas death statute in the absence of proof of the New Mexico death statute which was neither pleaded nor proved.

In Searcy v. Grant 90 Texas, 97, this court held that it was error for which this court would reverse the Court of Civil Appeals for that court to reverse a judgment for an error which was not an error of law apparent of record, and was not assigned as error. It would seem that the same rule should apply to an attempted assignment of error which is not such an assignment as the statute and rules require, as is shown by the many adjudications interpreting the statute and rules. The statute requires an assignment of error "distinctly specifying the grounds on which he relies." One which under a liberal construction of the law, fails to comply with it, is not better than no assignment of error.

In Ross v. Moskowitz 100 S. W. 768, this court refused to consider an assignment of error of the entire charge without a proposition stating the particular instruction complained of.

In the case of Cammack v. Rogers 73 S. W. 795, this court held that an assignment of error that "the court erred in refusing to give special charges 1 & 2," when said charges related to entirely different subjects was not in compliance with the law or rules. It is true that in that case it was held to be a matter of discretion to be exercised by the Court of Civil Appeals to consider or not to consider such an assignment. This decision, however, was made by this court upon a certificate to this court which did not disclose that the assignment in question was objected to by the appellee in the Court
93 of Civil Appeals. When not objected to by the opposing party it may well be said that it is only a matter relating to the convenience of the court. But it is respectfully submitted that the statute and rules made by this court having the force of law, prescribe rules of procedure in which appellee and defendants in error in courts of civil appeal have rights. If the statute and rules are made because such laws are necessary to enable the court to understand the precise points of contention of an appellant or plaintiff in error, then the same rules are necessary to compel a specific showing to the appellee or defendant in error of the questions which the latter must meet in the appellate court. The brief of the appealing party is to be answered by the appellee, and in order to answer it properly it would seem that the appellee should be able to require all the certainty which the court might require for its own purposes. There is no warrant for saying that the law as to assignments of error is made alone for the convenience of the court. The law nowhere so limits its application. Besides, to refer such questions for determination by the exercise of the discretion of the courts of civil appeals, when there is no particular reason why an assignment of error that is bad should be considered in one case and an assignment of error subject to the same objection should be disregarded in another, is merely to cause such questions to be decided arbitrarily according to the mere whim or disposition of a particular judge or court. There is nothing in such a question upon which to exercise a sound judicial discretion. Hence, it becomes a mere arbitrary power of the court to regard or disregard the law of procedure laid down to govern in such matters. The result is to introduce different practices according mainly to the disposition of the particular judge who writes the opinion in the court of Civil Appeals, and this renders the statute and rules having the force
94 of statutes, of no value to litigants. In the case at bar, though objections were made to several assignments of error and objections for lack of propositions of law, and statements were made, no express ruling is made on them, but as the court ignored these objections and considered the assignments and without propositions of law or statements, we must regard the objections as overruled by the Court of Civil Appeals.

We respectfully submit that when objections are seasonably raised for lack of assignments of error propositions or statements, or to defective ones, which do not comply with law, as shown by the decisions interpreting the law and rules, and which do not for that reason, legally raise questions, the appellee or defendant in error has a right under the law to have the law enforced on this subject

of procedure as well as in the law of pleading wherein the pleader must so plead as not only to advise the court specifically as to what he means, but so as to advise his opponents as to what he is required to answer.

II.

The Court of Civil Appeals erred in considering the constitutionality of the Employers' Liability Act and in holding it unconstitutional, when no question as to its constitutionality was raised or ruled on in the court below.

Statement.

The plaintiff's petition in the trial court did not disclose that the case rested on the Employers' Liability Act. The defendant below pleaded a certain restrictive legislative act of the Territory of New Mexico, which it claimed was applicable to the case, but whether to be considwered as part of the law of the case, and to be applied in connection with the Employers' Liability Act, if it was not in conflict therewith, the plea did not disclose. The plaintiff be-
95 low demurred to this plea of the New Mexico law, for three reasons, first, because said statute was superseded by Acts of Congress, not mentioning any particular act; second, because that part of the New Mexico statute which denied the right to sue elsewhere than in New Mexico was unconstitutional; and, third, because that part of said Act which sought to burden plaintiff's cause of action with a trip to New Mexico to make the affidavit of claim was unconstitutional.

The court below without indicating the grounds upon which it based its ruling, sustained the demurrer. The ruling may, therefore, have been based solely on the ground that the New Mexico statute was unconstitutional, and it does not necessarily appear that any ruling was made in ruling on demurrer as to the Acts of Congress or as to any particular Act of Congress. The Court of Civil Appeals in their original opinion interpreted the ruling as leveled against the New Mexico statute and sustained the ruling from that standpoint.

At any rate, neither the plea nor the demurrer raised or asserted any question as to the constitutionality of the Employers' Liability Act, or of any Act of Congress. Certainly the mere invoking of an Act of Congress by plaintiffs below, and the invoking of a particular statute of New Mexico by defendant below, did not necessarily raise any question as to the constitutionality of any particular Act of Congress. The unconstitutionality of the territorial Act was expressly raised by plaintiff below for reasons entirely aside from the Acts of Congress.

The question here then is not solely as to whether a ruling of the court below has been properly assigned or may be considered as error apparent of record, but the question is has there been any ruling at all by the trial court on the constitutionality of the Em-
96 ployers' Liability Act? An error apparent of record or fundamental error presupposes a ruling by the court below in which there was error, whether assigned as such or not. If there has not

been a ruling, then, it is respectfully submitted that the raising of the constitutionality of a law for the first time in an appellate tribunal is asking the appellate tribunal to exercise original jurisdiction. On this subject see Ironside v. City of Vinita, 98 S. W. 167, for quotations from Elliott on Appellate Procedure, which are also copied in our brief pp. 20, 21 & 22. On the proposition that a constitutional question cannot be raised for the first time in an appellate court, we refer to authorities cited in our brief pp. 12 & 13, and to argument and quotations from authorities pp. 13 to 23 of our brief on file.

III.

The Court of Civil Appeals erred in reviewing the ruling of the court below that the provision of the New Mexico law requiring affidavit as to claim for damages, list of witnesses, &c. was unconstitutional, because this ruling was not error apparent of record, and was not specifically assigned as error and presented by a proposition of law showing what rule of law was violated in the ruling.

Statement.

The first assignment of error as numbered in brief p. 6, is an omnibus assignment directed at several separate and different propositions of law, and it was not, therefore, specific as to any one as shown in another part of this application. No proposition of constitutional law is made following this assignment and pointing out the nature of the error of the court below in holding said New Mexico law unconstitutional.

The second assignment of error as given in brief, p. 10, is
97 specific enough, but it does not assign error on the holding of the court below that the New Mexico law was unconstitutional, but merely that the court erred in holding that it was superseded by Acts of Congress without designating any particular Act. The question of Acts of Congress superseding Acts of the Territory raises no question as to the constitutionality of the territorial laws. They are superseded by any Act of Congress which may conflict with them whether the territorial law is constitutional or unconstitutional. There is no proposition of law made under this assignment sustaining the constitutionality of the New Mexico law in question.

The third assignment as numbered in brief p. 11 is an omnibus assignment and is not specific. No one can tell from reading it what question of law it raises and no proposition of law follows it.

The fourth assignment, p. 11 of brief, is interpreted by opposing counsel in their proposition following it as having reference to another subject. No other assignment or proposition assumes to deal with the alleged error of the court below in holding that the New Mexico law as to affidavit, list of witnesses, &c., was unconstitutional. Hence the question as to the error in that ruling, if any, for which in the majority opinion on motion for a rehearing that alleged error, is made an additional ground for reversing is not raised so that that question can properly be considered on appeal.

IV.

As the New Mexico restrictive statute was eliminated from the case by the action of the trial court, which action, as before shown, is not properly brought up for review; as the Employers' Liability Act did not affect the trial otherwise than to cause that part of the charge as to comparative negligence to be given, and as the
98 giving of those rules as law in the charge is not assigned as error, and was not error apparent of record or even injurious error, as shown in other parts of this application, the unconstitutionality of said Act of Congress as applied to the territories, if it was thus unconstitutional, afforded no grounds for reversing the judgment of the court below, and the Court of Civil Appeals, therefore, erred in reversing and remanding the case because in part of the alleged unconstitutionality of said Act of Congress.

V.

The Court of Civil Appeals erred in holding that the Employers' Liability Act of Congress was unconstitutional as applied to the territories of the United States, and in reversing and remanding this cause for that reason.

Proposition Under Above Assignment.

The provisions of said Act of Congress relating to the territories and the District of Columbia are clearly separate, severable and complete in their application to the territories and the District of Columbia from the provisions relating to carriers of interstate commerce and their employés; and the former provisions are in no wise so blended with the latter provisions as to render them non-severable; nor is there any reason to justify the conclusion that Congress, which evidently deemed the provisions of said statute wise and just both as to carriers and their employés in the territories and in the District of Columbia, as well as to carriers of interstate commerce, would not have enacted said law for the territories and the District of Columbia if it had been restricted to the District of Columbia and the territories.

Argument.

We here adopt as our main argument on this proposition the opinion of the Court of Appeals of the District of Columbia
99 speaking through the Chief Justice Seth Shepard, a copy of which opinion is filed with the record in this case, and this court is respectfully requested to read it as a part of our argument.

In addition to that opinion we will submit a few observations on the opinion of the Supreme Court of the United States in the Howard and Brooks cases decided January 6, 1908, and reported in advance sheets L. Edition of U. S. Supreme Court decisions issued February 1, 1908, holding the Employers' Liability Act to be unconstitutional as applied to interstate and intra-state commerce.

1. In the first place, it is to be noted that the decision referred to is not authority for this court if that court has attempted therein to

decide that the Act of Congress in question is unconstitutional as applied to the territories, because there was no case before that court in which such a decision might have been made without violating the well established doctrine and precedents in that and other courts to avoid a decision of questions, especially constitutional questions, which do not arise in the case before the court. That court in the case of United States v. Steffens 100 U. S. 82, 25 Law Ed. 552, in declining to decide a constitutional question which was not properly before it, said:

"We adopt this course because when this court is called in the course of the administration of the law to consider whether an Act of Congress, or any other department of government, is within the constitutional authority of that department a due respect for a co-ordinate branch of the government requires that we shall decide that it has transcended its powers only when that is so plain that we can-not avoid the duty.

In such cases it is manifestly the dictate of wisdom and judicial propriety to decide no more than is necessary to the case in hand."

That court being actuated by the rule of judicial propriety
100 here stated, should not be supposed to intend to decide an important phase of a constitutional question which it is not necessary to decide in disposing of a case before it.

2. The question as to the severability of the provisions of that law with reference to the territories and the District of Columbia from the interstate and intra-state commerce subjects and the manifest difference in the source of the power of Congress over one from the power over the other, would certainly have led to some argument and reasoning over the validity of the statute as applied to the territories and the District of Columbia if there had been any purpose to make a decision on that subject.

3. As the decision as to the territories and District of Columbia, if they are included, is mere dictum, it has no force as an authority; and as it expresses no argument or reasoning on those subjects, it is of no value as authority or argument in this case.

4. But as the mere expression of an opinion on these subjects might be of persuasive weight in this court, we desire to make such an analysis of the opinion as will show that the court had no thought of deciding the question as to the constitutionality of the Employers' Liability Act as applied to the territories and the District of Columbia.

Those who have attempted to construe the opinion of the Supreme Court to hold that that court included in its pronouncement the provisions of the act relating to the territories and the District of Columbia usually refer to the concluding paragraph of the opinion which reads as follows (words in brackets interpolated by us as being implied):

"Concluding as we do, that the statute, whilst it embraces subjects within the authority of Congress *to regulate commerce*, also
101 includes subjects not within its constitutional power (to regulate commerce) and that the two (subjects relating to regulations — commerce) are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below

rightly held the statute to be repugnant to the Constitution and non-enforceable (as to interstate and intra-state commerce). The interpolations indicated by the interpolated words of ours in parenthesis are necessarily implied from the context and they harmonize the conclusion announced by the court with the context of the opinion, avoid the imputation of obiter expressions by the court, and relieve that court from being understood to state that subjects in the statute are not severable which the plain reading of the statute shows to be easily severable from the unconstitutional parts. It was the unconstitutional and constitutional parts relating to commerce between the states which the court meant to say were not severable. In other words, what the court meant was that the language was not severable so as to be applied alone to employés who might be injured while actually engaged in commerce between the states and not to have application to interstate commerce carriers when such carriers were not actually engaged in interstate commerce.

To verify this construction let us examine some parts of the context of the opinion. The court said:

"All the questions which arise concern the nature and extent of the power of Congress to regulate commerce."

* * * * * * *

"But it is argued, even though it be conceded that the power of Congress may be exercised as to the relation of master and servant, in matters of interstate commerce, that power cannot be lawfully extended so as to include the regulation of the relation of
102 master and servant, or of the servants among themselves, as to things which are not interstate commerce. From this it is insisted the repugnancy of the act to the Constitution is clearly shown, as the face of the act makes it certain that the power which it asserts extends not only to the relation of master and servant and servants among themselves *as to things which are wholly interstate commerce*, but embraces those relations *as to matters and things domestic in their character*, and which do not come within the authority of Congress. To test this proposition requires us to consider the text of the act."

* * * * * * *

"From this it follows that the statute deals with all the concerns of the individuals or corporations to which it relates if they engage as common carriers in trade or commerce between the states, etc., and does not confine itself to the interstate commerce business which may be done by such persons. Stated in another form, the statute is addressed to the individuals or corporations who are engaged in interstate commerce, and is not confined solely to regulating the interstate commerce business which such persons may do,—that is, it regulates the persons because they engage in interstate commerce, and does not alone regulate the business of interstate commerce.

"The act, then, being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to

the business in which the carriers or their employees may be engaged at the time of the injury, *of necessity includes subjects wholly outside of the power of Congress to regulate commerce.* Without stopping to consider the numerous instances where, although a common carrier is engaged in interstate commerce, such carrier may, in the nature of things, also transact business not interstate com-
103 merce, although such local business may indirectly be related to interstate commerce, a few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exerted by the statute. Take a railroad engaged in interstate commerce, having a purely local branch operated wholly within a state. Take again the same road having shops for repairs, and, it may be, for construction work, as well as a large accounting and clerical force, and having, it may be, storage elevators and warehouses, not to suggest, besides, the possibility of its being engaged in other independent enterprises. Take a telegraph company engaged in the transmission of interstate and local messages. Take an express company engaged in local as well as in interstate business. Take a trolley line moving wholly within a state as to a large part of its business and yet, as to the remainder, crossing the state line.

"As the act thus includes many subjects wholly beyond the power to regulate commerce, and depends for its sanction *upon that authority,* it results that the act is repugnant to the Constitution, and cannot be enforced unless there be merit in the propositions advanced to show that the statute may be saved."

* * * * * * *

"As the act before us, by its terms, *relates to every common carrier engaged in interstate commerce and to any of the employees of every such carrier,* thereby regulating every relation of a carrier engaged in interstate commerce with its servants and of such servants among themselves, we are unable to say that the statute would have been enacted had its provisions been restricted to the limited relations *of that character* which it was within the power of Congress to regulate."

104 "Concluding, as we do, that the statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below rightly held the statute to be repugnant to the Constitution and non-enforceable; and the judgments below are, therefore, affirmed."

Attention to the foregoing extracts from the opinion of the court serves to identify the two subjects, one constitutional and the other unconstitutional, which the court had in mind in the concluding paragraph, and shows that the two subjects had no reference to the power of congress over the territories or the District of Columbia. This construction is also clearly indicated in the concluding paragraph of the concurring opinion written by Mr. Justice Peckham, in which he was joined by the Chief Justice and Mr. Justice Brewer, as follows:

"I concur in the proposition that, as to traffic or other matters within the state, the act is unconstitutional, and it cannot be separated from that part which is claimed to be valid *as relating to interstate commerce*. As that is all that it is necessary to decide in this case, I place my concurrence upon that part of the opinion which decides it."

This expression as to the blending of a part of the subject *relating to commerce* with another part relating also to commerce between the states, so that these two subjects were not severable shows plainly the two subjects spoken of in the concluding part of Mr. Justice White's opinion. And that Mr. Justice White had in view those two subjects being blended and, that he did not have refer-
105 ence to the application of the statute to territories is clearly shown in the extract from the opinion hereinbefore quoted where the court discusses the improbability of Congress having enacted the law if it was restricted to the one subject.

The court said:

"As the act before us, by its terms, relates to every common carrier engaged in interstate commerce, and to any of the employés of every such carrier, thereby regulating every relation of a carrier engaged in interstate commerce with its servants and of such servants among themselves, we are unable to say that the statute would have been enacted had its provisions been restricted to the limited relations *of that character* which it was within the power of Congress to regulate."

Here it is seen that the court is not considering whether or not the Congress would have enacted the law alone for the territories and the District of Columbia, if the act had been restricted to that field of action, but is considering alone whether if it had been restricted in its application to servants actually handling interstate commerce it would have been passed by Congress so as to affect interstate commerce alone.

In the territories there is no difficulty in applying the act to all carriers and to all their employés and without regard to what kind of commerce the carriers may be engaged in.

As is shown by the opinion of the Court of Appeals of the District of Columbia, there is no blending of the language of the statute in relation to common carriers engaged in commerce in the District of Columbia or in the territories with that in relation to carriers engaged in commerce between the states, and that the former may stand though the latter may fall. There is no more difficulty
106 involved in legislation by Congress to apply in the territories alone to carriers therein who may also be carriers of commerce between the territory and a state than there is involved in like legislation by states to govern intra-state business alone, because the carriers thus regulated also carry interstate commerce. Nor is there any more reason to suppose that Congress would not pass an act if restricted in its application to the District of Columbia and the territories, which it has habitual- separately legislated for than there is reason to believe that Congress would not pass an act to govern carriers of interstate commerce because the same carriers

were also engaged in carrying intra-state commerce which the states alone can regulate.

The trade mark cases U. S. v. Steffens, and other cases 100 U. S. 82, cited and quoted from by the U. S. Supreme Court in the case we have been considering, while analogous to the question that court was discussing—the limiting of the act by construction to one class of employés and carriers engaged in interstate commerce—yet said cases have no application to the question here considered. There was no severable language used in the act to apply it to trade marks used in interstate commerce. Those cases are wholly inapplicable to the language used in the act of Congress on the subject of carriers in the District of Columbia and in the territories wherein separate language is used to apply to those localities.

The trade mark cases made no allusion to the District of Columbia or the territories, nor even to interstate commerce as separate parts of the subject to be covered, and hence, the Supreme Court held that it could not by construction limit the application of the act to interstate commerce or to the territories. The attempt made by the Court of Civil Appeals in the case of A. F. & S. F. Ry. Co. v.
107 Mills, S. W., to apply the decision in the trade mark cases to the position occupied by the District of Columbia and the territories in the Employers' Liability Act is manifestly weak. That act clearly deals severally with the District of Columbia and the territories as one subject interstate commerce as another, and foreign commerce as still another, and all the provisions naming the other subjects may be stricken out and leave the statute complete as to the District of Columbia and the territories without interpolating into or limiting it by construction. We will refer to some of the U. S. Supreme Court cases which are more in point than the trade mark cases. In the case of Keokuk N. L. Packet Co. v. Keokuk, 95 U. S., 80, 24th Law. Ed. 377, that court upheld an ordinance of the City of Keokuk as to the part thereof imposing wharfage charges for use of wharfs; holding that part severable from the part making wharfage charges for landing of vessels where there was no wharf, which was unconstitutional.

In the case of Diamond Glue Co. v. U. S. Glue Co. 187 U. S. 611, 47 Law. Ed. 328, the court in passing on a statute of Wisconsin affecting the right of foreign corporations and partnerships to do business in Wisconsin, sustained the prohibitive features as to foreign corporation, and as to partnerships said:

"We shall not consider the law as applied to unincorporated associations because in our opinion the application of the provision to corporations was severable from, and independent of, its application to partnerships, so that, even if in the latter aspect the section was bad, it remained unaffected and valid, so far as this case is concerned."

In the case of Little Rock, etc., Ry. Co. v. Worthen & Huntington v. Same 120 U. S. 97, 30 Law. Ed. 588, the court said:
108 "It is only when different clauses of an Act are so dependent upon each that it is evident the legislature would not have enacted one of them without the other—as when the two

things provided are necessary parts of the same system. That the whole Act will fall with the invalidity of one clause. When there is no such connection and dependency the Act will stand, though different parts of it are rejected."

Now in the case at bar the operation and effect of the clauses relating to the territories are in no way dependent upon the clauses as to interstate or foreign commerce; and in a suit for an injury or death in a territory the pleading, in order to be available under the statute, need contain no allegation about interstate, intra-state or foreign commerce. This demonstrates the entire severability of the Act.

In the case of Olsen v. Smith, 68 S. W., 320, the same court of Civil Appeals which decided this case when in our opinion better understanding the law than it understood it when deciding the case at bar, announced the correct rule and made an application of the rule, and was sustained therein by this court, which refused a writ of error applied for in that case. In that case the court said:

"Appellant insists that the several provisions of our pilot law constitute one entire scheme, and the intent of the legislature to exempt Texas vessels engaged in strictly state commerce, and to include all coastwise vessels over 75 tons burden are so interwoven and connected that it is impossible to separate them, or to declare that the legislature would have enacted the law at all if they had in view the illegality of such particular exemption and inclusion. That the objectionable provisions are separable from the rest of the provisions seems to us too plain for discussion. The invalid
109 provisions relate only to coastwise vessels, as distinguished from foreign ones. Therefore, the subject matters are distinct, as between these classes of vessels."

The striking analogy of the rule as to several provisions and of the facts to which it was applied in that case to the case at bar is very apparent. In the case at bar "the subject matters are distinct." The unconstitutional provisions relate to carriers engaged in interstate commerce, one subject matter. The constitutional provisions relate to carriers engaged in commerce in the District of Columbia and in the territories. The provisions as to neither *is* in anywise dependent on the provisions as to the other.

VI.

The Court of Civil Appeals erred in holding on motion for rehearing that so much of the statute of New Mexico pleaded by defendant in the trial court as required a person injured, or the representative of a deceased person, to make an affidavit before some officer authorized to administer oaths in New Mexico as to the claim for damages, list of witnesses, their residences, &c., was constitutional and applicable and enforceable in Texas courts against a non-resident of New Mexico who might be injured therein.

First Proposition under VIth Assignment.

The provision of the New Mexico statute in question restricted the bringing of suits for personal injuries or deaths to the courts of New Mexico, and hence the provision for making and serving a notice of claim thirty days before bringing suit thereon must have had reference to a suit in New Mexico and is therefore dependent on the provision requiring suits to be brought in New Mexico; and that provision being ineffective to prevent citizens of other territories or states from suing on transitory causes of action wherever the defendant may be lawfully served with citation, the provision as to notice within ninety days after injury and thirty days prior to instituting a suit in New Mexico, have no application to a suit brought elsewhere than in New Mexico, and are so blended with the other restrictive part that they fall with the provision prohibiting suit elsewhere.

Authorities.

A. T. & S. F. Ry. Co. v. Sowers, 99 S. W. 190.

Argument.

In the Sowers case this court refused a writ of error. It was there held that the provision of the statute in question forbidding suit elsewhere than in New Mexico was unconstitutional and void.

In the case of Buttron v. E. P. & N. E. Ry. Co., 93 S. W. 676, all the provisions of the law in question were upheld by the Court of Civil Appeals, but a decison of the questions as to the validity of the several provisions of this law was in that case uncalled for by the facts of the case. The plea and proof of a judgment of a court of competent jurisdiction in New Mexico adjudicating the very cause of action sued on in that case was necessarily conclusive of that case. The other remarks were mere obiter expressions. Besides, the Sowers case is the latest case, and must be deemed to overrule all of the decision in the Buttron case, which is inconsistent with the Sowers case.

Second Proposition under Sixth Assignment in this Court.

The Legislature of New Mexico in prescribing as conditions precedent to the arising of a cause of action for personal injury the bringing of a suit in New Mexico and the burdening a right of action with the expense and labor of a trip to New Mexico by a non-resident who may have been injured while passing through there
111 assumed the power to deny a right of action for an injury to one's person except he submit to expenses which in many cases might exceed the sum to be recovered, and in others would greatly burden the right of action. The 14th Amendment to the Constitution of the United States, which was made applicable to New Mexico by the organic Act of Congress organizing New Mexico forbid the denial of a right of action or unduly burdening the same with onerous conditions precedent in New Mexico.

Third Proposition under Sixth Assignment.

The right of each person to have remedy for a transitory cause of action by due process of law in the courts of any state where he may be able to find and serve a person or corporation which may have unlawfully injured him in his person or property is one of the privileges guaranteed every citizen by the Constitution of the United States, and may not be denied him in one state by the Legislature of another state or territory any more than it might be denied him by the state in whose courts he seeks remedy.

Fourth Proposition under Sixth Assignment.

The Statute of New Mexico in so far as it burdens the cause of action of a living person who survives a personal injury and sues in his own right is unconstitutional and void as against a non-resident of New Mexico in that it attempts to burden his cause of action with the labor and expense of a trip to New Mexico as a condition precedent to exercising his right to sue.

Authorities.

See list of authorities cited in our brief at pages 32 & 34.

In Chambers v. Baltimore & O. R. Co., decided by U. S. Supreme Court and reported in Law. Ed. Advanced Sheets of Dec. 16,
112 1907, a copy of which is filed with this record, that court said with reference to the right to sue and defend in courts:

"It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution," citing many authorities.

In Angle v. Chicago, St. P. M. & O. Ry. Co., 151 U. S. 1, the court said:

"The right of action to recover damages for injury is property."

It must follow that the right to acquire a right of action for personal injury against one who unlawfully injuries another rests upon the same constitutional guarantees as does the right to acquire property.

But it may be said that no right accrues to any one for the death of another except to the extent that such a right of action is created by statute, and that, therefore, the Chambers case above cited in what is finally decided disposes of our contention in this a death case. This leads to our next proposition.

Fifth Proposition under Sixth Assignment.

If the statute of New Mexico restricting the right to sue for personal injuries to the courts of that territory and burdening a cause of action with the labor and expense of a trip by a non-resident to that territory, is unconstitutional as to persons who are injured and

survive the injury, then as it is not severable in its provisions so as to be applied alone to death cases, and as it is wholly improbable
113 that it would have been passed to apply alone to death cases if the Legislature had understood that it could not be enforced as to personal injury cases where the person injured survived the injury, it must fail altogether.

Sixth Proposition under Sixth Assignment.

If this court shall hold that the constitutionality of the Act of Congress in question as to the territories is properly before the court for decision, and that it is unconstitutional as applied to the territories, nevertheless, this court should reverse the judgment of the Court of Civil Appeals and affirm the judgment of the court below, if this court shall hold that the ruling or lack of ruling by the trial court on the constitutionality of the restrictive statute of New Mexico, is not properly brought up to call for a revision of the failure of the trial court to give effect to that act, or that that act is unconstitutional or inapplicable to procedure in Texas courts. In such event the judgment of the court below should be affirmed because the only effect of the Act of Congress on the trial was to lead the court below to give in charge to the jury the rules as to comparative negligence contained in that Act, to which part of the charge there is no assignment of error; and as those rules injure a defendant only when there is evidence from which a jury might have found that the injured party was guilty of contributory negligence, the plaintiff in error in the Court of Civil Appeals, in order to show material, or injurious error, should have shown by assignment of error, proposition and statement that injurious error did occur, otherwise he does not show reversible error. In such a case the reversible error is not "apparent" but must be demonstrated.

Seventh Proposition under Sixth Assignment of Errors.

As the cause of action does not arise under the restrictive
114 Act of New Mexico, but is held suspended from enforcement through the courts if that statute was enforceable in Texas at the time of the trial, yet as it affects the remedy only and would be no bar to a new trial of this cause if it is reversed and remanded, because it has been nullified by Act of Congress, pending this appeal, the error, if any, in failing to enforce said statute, should not now be regarded as cause for reversing the judgment of the court below when said statute would not exist to be enforced upon another trial.

Lewis' Southerland Statutory Construction, Sec. 283 & 284, and authorities there cited.

"When a remedy upon a contract not unlawful is prohibited, a repeal of the statute will restore the remedy."

Lewis' Southerland Sec. 284.
Johnson v. Meeker, 1 Wis. 436.

Your petitioner represents that W. A. Hawkins and John Franklin, lawyers practising under the firm name and style of Hawkins &

Franklin, and who reside in El Paso County, Texas, and whose post office address is El Paso, Texas, are attorneys of record for the plaintiff in error in this cause in the Court of Civil Appeals.

Wherefore, petitioner prays for a writ of error in said cause to the end that said cause may be brought before this court, and the aforesaid errors reviewed and corrected and she prays that the judgment of the Court of Civil Appeals may be reversed and that the judgment of the District Court be affirmed.

F. G. MORRIS,
Attorney for Plaintiff in Error.

Post Office, El Paso, Texas.

115 (Endorsed:) App. No. 6017. Enedina Gutierrez, Adm'x Plaintiff in error vs. El Paso & Northeastern Railway Company. Application for writ of error. Filed in the Court of Civil Appeals at San Antonio, Texas, July 10, 1908. Jos. Murray Clerk. Filed in Supreme Court, July 15, 1908. F. T. Connerly, Clerk, by J. S. Myrick, Deputy. Refused. Granted.

Order Refusing Application for Writ of Error.

Oct. 14th, 1908.

App. No. 6017.

ENEDINA GUTIERREZ, Adm'x,
vs.
EL PASO & N. E. RY. CO.

From El Paso Co., 4th District.

This day came on to be heard the application of Enedina Gutierrez, Adm'x for a writ of error to the Court of Civil Appeals for the Fourth District and the same having been duly considered, it is ordered that said application be refused; That the applicant Enedina Gutierrez, Administratrix, pay all costs incurred on this application.

Motion for Rehearing by Plaintiff in Error.

Filed Oct. 29, 1908.

In the Supreme Court of the State of Texas.

ENEDINA GUTIERREZ, Adm'r'x, Plaintiff in Error,
vs.
EL PASO & NORTHEASTERN RAILWAY CO., Defendant in Error.

Motion for Rehearing by Plaintiff in Error.

Now comes the plaintiff in error and moves this court to set
116 aside the order made in this cause refusing the application for writ of error, and to grant said writ of error and reverse the

Judgment of the Court of Civil Appeals reversing and remanding this cause for a new trial, and to affirm the Judgment of the District Court on the following grounds; counsel for the plaintiff in error stating as grounds for this motion that he has new argument and new authorities to present on two questions presented in the application:

First. Because this court erred in refusing to grant the writ of error because the result of the dissent of Mr. Justice Fly of the Court of Civil Appeals, if not the argument thereof, should have been sustained and the Judgment of the District Court should have been affirmed by the Court of Civil Appeals, notwithstanding the holding which we presume this court made that the Employers' Liability Act was unconstitutional as well in the Territories as in the States. This proposition is based on two others:

First. The act of New Mexico restrictive of remedies for personal injuries was not only disapproved by Congress, but we find, upon seeing the joint resolution disapproving it, which we did not have access to when this application was made, that it declared the act to be null and void and of no effect. Hence, notwithstanding said act was in effect when the trial occurred in the District Court, a disregard of it by the District Court become immaterial error in the Court of Civil Appeals, because the act was nullified by Congress before the Court of Civil Appeals disposed of the case, and without a saving clause as to pending cases, and could never be applied on another trial. The New Mexico statute did not confer any right of action but assuming that by statute and common law rights would arise it merely restricted the remedy to cases wherein a notice
117 of claim and list of witnesses was furnished the defendant, and to cases instituted in the territorial courts of New Mexico. The latter restriction was held void by this court in A. T. & S. F. Ry. Co. vs. Sowers 99 S. W. 190, in refusing a writ of error to the Court of Civil Appeals so holding. The Court of Civil Appeals in the case at bar in the original opinion held all the restrictions void, but without a motion for rehearing on this question, a majority of that court in overruling our motion for a rehearing, asked for on other grounds, on their own motion, held the restriction as to notice and furnishing a list of witnesses to be operative in Texas Courts, although it had been entirely nullified by the Congress when this holding by the majority was made one of the grounds of reversing and remanding the cause. Mr. Justice Fly dissented. Appellees in that Court made a second motion for rehearing, in order to complain of that ruling which had not been made when the first motion for rehearing was filed, and in order to be able to assign that ruling as error in this court. That ruling is assigned as error in our VI assignment of error in this court p. 27 of application for writ of error and was further presented and argued under Seventy Proposition under Sixth Assignment of Error in this Court p. 31 of the application to this Court.

We there called attention to Mr. Sutherland's statement of the law as follows:

"When a remedy upon a contract not unlawful is prohibited, a re-

peal of the Statute will restore the remedy" Lewis Southerland on Statutory Construction Sec. 284; Johnson v. Meeker 1 Wis. 436.

But we did not cite the organic statutes of New Mexico or the Joint Resolution of Congress nullifying said New Mexico Law so as to get its language before the Court, though we made this point against the New Mexico restrictive statute.

The Act of Congress relating to New Mexico, after vesting
118 certain conditional legislative power contained the following clause:

"All laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States and if disapproved shall be null and of no effect."

Amended Act of July 30, 1886, Sup. R. S. p. 503, also Revised Statutes U. S. sec. 1850.

The Joint Resolution of Congress of May 13, 1908, after setting out this New Mexico statute preceeded as follows:

There- be it

"Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled, that said law of the Territory of New Mexico, as aforesaid, be, and the same is hereby, disapproved and declared null and of no effect." Acts of 60th Congress, First Session, P. 573.

Certainly when a *remedy* is thus restricted by a statute which is from its inception expressly subject not merely to a repeal, but to a nullification so that it can have no effect, cannot be said to exist after the statute is nullified without a reservation as to pending cases, whatever may be said as to rights sought to be created by such a statute.

This suit having been instituted while said law was in force and not having ever been dismissed from court, before said law was nullified, it should not be disposed of with respect to that law as to the remedy when that law has been nullified. If there was error on the part of the District Court in disregarding it, that error ceased to be material when the act was nullified. There could be no valid reason for reversing and remanding the case for a violation of that law in matters which did not go to the foundation of the right of action, but made certain requirements as to notice list of witness etc. when a failure to observe those requirements could be
119 of no possible importance in a retrial of the case. If the Judgment was otherwise right it should be assumed that on another trial wherein said New Mexico Statute could not be operative the Judgment would be the same.

Second. Our second proposition involved in the alleged error in this motion in the refusal by this court of the application for writ of error, is, that the court will presume that there existed in New Mexico the same laws as those existing in Texas conferring the right of action sought to be maintained so that the case may as well be regarded as resting on those laws, as upon the Employers' Liability Act; there being no pleading in plaintiff's petition specifically resting the case on either set of laws; and the trial being without error under the Texas laws, except in the particular that the court

charged the jury the rules of comparative negligence prescribed in the act of Congress; and as this error was not assigned as error by appellant, except as it may be included in an omnibus assignment of error on the whole charge without specification of any particular error, and as it was not shown to be fundamental or even injurious error, the judgment should not have been reversed by the Court of Civil Appeals for said error in the charge alone, nor should this court have refused the writ of error applied for because of the holding, as we presume by this court, that the Court of Civil Appeals was right in deciding that the Employers' Liability Act is unconstitutional as well in the District of Columbia and the Territories as in the States.

It will be noticed that the rules as to comparative negligence stated in the act of Congress only apply to cases wherein there is evidence of contributory negligence. When there is no such evidence of contributory negligence as to call for a charge on a reduction of damages on that ground the giving of the rule of the statute is error only against the plaintiff as it is to give the Texas rules as to contributory negligence when there is no sufficient evidence to
120 justify charging on that subject. Hence when a defendant complains of such a charge he must specifically assign error on that part of the charge, and show that it was material error by a statement under his assignment or proposition of the evidence from the record to show that there was such evidence of contributory negligence as rendered an erroneous charge on that subject injurious to the defendant's rights. If this is not done the error is not made to appear as a ground for reversal but is to be passed as non-injurious error or as only injurious to the plaintiff below.

Appellants in this case made no assignment of error on the charge on contributory negligence for introducing the rule of reduction of damages in proportion to negligence of plaintiff and defendant or for failing to charge that contributory negligence on the part of plaintiff should defeat this cause of action; nor did appellant make any statement from the record which would show that any charge on contributory negligence should have been given. The charge as far as it went was on contributory negligence, and though not the law was more favorable to defendant than no charge on contributory negligence would have been. If none had been given certainly there would have been no error apparent without a statement of the evidence from the record showing that a correct one on contributory negligence should have been given.

The IV. assignment of error p. 16 of application, and in sixth proposition on page 30 and 31 of application raise the question here discussed. If the testimony as contained in the record is looked to it will be found that the deceased employee was in the act of passing from one car to another when killed, on a slowly moving train in the discharge of duties of his employment when ordinarily it would have been no negligence to do so, he being instructed to move
121 shovels from one car to another. The train was going slow enough for a brakeman to run along with it and uncouple the cars. Just as deceased was about to step or was in the act of

stepping from one car to another, the brakesman without warning to him suddenly uncoupled the cars by a side bar and they separated and deceased fell. The proximate cause of the injury was the act of the brakesman, there being no evidence that deceased was negligent or that his acts contributed to his injury and death.

Therefore we earnestly contend that neither of the grounds of reversal made in the ruling of the court of Civil Appeals was ground for reversal of the judgment when the judgment was reversed, notwithstanding both of the rulings, the one sustaining the New Mexico law without considering its nullification, and the one holding the Employers' Liability Act to be unconstitutional may both be correct and that this Court erred in not granting the writ of error notwithstanding this Court may approve each of said rulings as abstract law.

Second. The motion for rehearing should be granted because this court erred in holding the Employers' Liability Act unconstitutional as applied to the territories because it was clearly severable as to that subject; and no reason appears why Congress might not have passed it as to the District of Columbia and the Territories if Congress had known it would not have been sustained in the states.

We raise this subject again in order to call the attention of this court to the judgment of Congress that the original Employers' Liability Act was constitutional as to the District of Columbia and to the Territories as is shown in the saving clause in the new act in favor of all cases arising under the old law. Acts of 60 Congress First Session p. 65. As the old act had been finally held un-
122 constitutional as to the States, this reservation can have no other meaning than that Congress was of the opinion that it was valid in some other sphere or spheres to which it applied.

This opinion of Congress, which we did not before cite, may have some pursua-ve force with the Court, and together with the able opinion of the Court of Appeals of the District of Columbia, a copy of which we filed with the application for writ of error might lead the court to change its opinion if in doubt. A doubt as to the constitutionality of a statute is usually resolved in favor of its constitutionality. Whatever difference of opinion may exist as to the meaning of the opinion of Mr. Justice White in the case wherein the Employers' Liability Act was held unconstitutional as to the states, with reference to whether or not he intended to include the territories and the District of Columbia, all can agree that the opinion is not authority as to the effect of the Act of Congress in question in the District of Columbia and in the territories, for no such case was before the court.

Of course this question will not be important in this case if plaintiff in error should be sustained in the contentions presented in the first part of this motion. But if not thus sustained we invite attention to it again but will not reargue it.

F. G. MORRIS,
Att'y for Plaintiff in Error.

123 (Endorsed): Motion No. 1962. Enedina Gutierrez, Admx. Plaintiff in Error, vs. El Paso & N. E. Ry. Co., Defendant in

Error. Motion for rehearing by Plaintiff in Error. Filed in Supreme Court Oct. 29, 1908. F. T. Connerly, Clerk, by J. S. Myrick Deputy. Granted.

Order Granting Motion for Rehearing and Application for Writ of Error.

January 27th, 1909.

Mo. No. 1962 of App. No. 6017.

ENEDINA GUTIERREZ, Ad'm'x,
vs.
EL PASO & N. E. RY. CO.

From El Paso Co., 4th District.

This day came on to be heard the motion of Enedina Gutierrez, Admx. for a rehearing of App. for writ of error No. 6017 and the same having been duly considered, because it is the Opinion of this Court that said motion ought to be sustained, it is therefore considered, adjudged and ordered that said motion for rehearing be granted: That the former Judgment of this Court refusing the application for writ of error, entered on October 14th, 1908 be set aside and vacated and that the following Judgment be entered in lieu thereof to wit: "This day came on to be heard the application of Enedina Gutierrez, Admx. for a writ of error to the Court of Civil Appeals for the Fourth District and the same having been duly considered, it is ordered that said application be granted and the writ of error issue as prayed for upon the filing by the applicant of a bond in the sum of fifty dollars conditioned to pay the costs of this Court, and payable to the adverse parties as prescribed by law.

124 *Certified Copy of Writ of Error Bond.*

Filed Feb. 3rd, 1909.

In the Supreme Court of Texas, at Austin.

ENEDINA GUTIERREZ, Ad'mr-,
vs.
EL PASO & NORTHEASTERN RAILWAY COMPANY.

Know all men by these presents: That we, Enedina Gutierrez, in her own right and as administratrix of the estate of Antonio Gutierrez, deceased, plaintiff in error in the above styled and numbered cause, as principal and C. B. Patterson and Sam B. Gillett, as sureties acknowledged ourselves indebted to the El Paso & Northeastern Railway Company, defendant in error in the above styled and numbered

cause, in the sum of Fifty Dollars for the payment of which well and truly to be made, we hereby bind ourselves, our heirs, and legal representatives firmly by these presents, conditioned, nevertheless, that whereas in the above styled and numbered cause the Supreme Court of Texas has granted a Writ of Error to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas,

Now, therefore, if the said Enedina Gutierrez in her own right and as administratrix of the estate of Antonio Gutierrez, deceased, shall prosecute said Writ of Error with effect and shall pay all costs that may be adjudged against her in her own right or as such administratrix, in the Supreme Court of Texas, in said cause, then the foregoing abligation shall be null and void, otherwise to remain in full force and obligation in law.

Witness our hands this the 1st day of February, A. D. 1909.

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ENEDINA GUTIERREZ.
ENEDINA GUTIERREZ,
As Administratrix, Estate of
Antonio Gutierrez, Dec'd.
By F. G. MORRIS,
Att'y for Plaintiff in Error.
C. B. PATTERSON &
SAM B. GILLET,
Sureties.

Approved this 1st day of Feby. A. D. 1909. I. Alderete, Clerk L. M. Dunlap, D'p'y.

THE STATE OF TEXAS,
County of El Paso.

I, I. Alderete, Clerk of the District Court of El Paso County, Texas, do certify that the foregoing bond is a true and correct copy of the bond filed on this day in the District Court of El Paso County, Texas, in cause No. 6017, Anedina Gutierrez, Administratrix, against the El Paso & Northeastern Railway Company, and approved by me.

Given under my hand and seal of said court at office in El Paso this the 1st day of Feby. A. D. 1909.

I. ALDERETE,
Clerk District Court El Paso Co., Texas.
By L. M. DUNLAP, *Deputy.*

(Endorsed): Motion No. 6017. Enedina Gutierrez, Admx. Plaintiff in error vs. E. P. & N. E. Ry. Co. Defendant in Error. Certified Copy of Writ of Error bond. Filed In Supreme Court Feby. 3rd, 1909, F. T. Connerly, Clerk, by J. S. Myrick, Deputy.

126 *Citation.*

Issued Feby. 3rd, 1909.

The State of Texas to the Sheriff or any Constable of El Paso County, Greeting:

You are hereby commanded, by delivering to El Paso & Northeastern Railway Company, if found in your County, or to Hawkins & Franklin attorneys of record, the accompanying certified copy of this writ, to summons said El Paso & Northeastern Railway Company to be and appear before the Supreme Court of the State of Texas, now in session at Austin, Texas, on Wednesday, the 24th day of February 1909, provided this writ shall have been served ten days prior to that time; but if this writ shall not have been so served, then on the first Wednesday next ensuing, ten days after such service, pursuant to a writ of error filed in the Clerk's Office of the Court of Civil Appeals for the Fourth Supreme Judicial District, and issued on the 3rd day of February 1909, wherein Enedina Gutierrez, Administratrix of the Estate of Antonio Gutierrez is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error should not be corrected, and why speedy justice should not be done to the parties in that behalf. And of this writ with your action endorsed thereon, make due return within ten days from the date hereof.

Witness, the Hon. Reuben R. Gaines, Chief Justice of the Supreme Court of Texas, the 3rd day of February in the year of our Lord one thousand nine hundred and Nine.

[SEAL.]

F. T. CONNERLY, *Clerk*,
By J. S. MYRICK, *Deputy*.

127 (Endorsed): No. ——. In the Supreme Court. Enedina Gutierrez, Admx. vs. El Paso & N. E. Ry. Co. Citation. Issued Feby. 3rd, 1909. F. T. Connerly, Clerk Supreme Court, by J. S. Myrick Deputy. Sheriff's return. Received Feby. 7, 1909. Executed Feby. 8th, 1909 by delivering to the within named John Franklin of the firm of Hawkins & Franklin, Attys. of record the accompanying certified copy of this writ. F. J. Hall, Sheriff of El Paso County, by Henry W. Gammel, Deputy.

Order of Submission.

Feb'y 24, 1909.

No. 1933.

ENEDINA GUTIERREZ, Ad'm'x,
vs.
EL PASO & N. E. RY. CO.

(From El Paso County—Fourth District.)

Submitted upon briefs and orally for both parties.

Opinion.

Filed March 24th, 1909.

No. 1933.

ENEDINA GUTIERREZ, Plaintiff in Error,
vs.
EL PASO & NORTHEASTERN RAILROAD COMPANY, Defendant in Error.

(From El Paso County—Fourth District.)

This suit was instituted in the district court of El Paso County on April 19, 1907, by the plaintiff in error as administratrix of the estate of Antonio Gutierrez for the benefit of herself as the widow of the said deceased. It was alleged that the said Antonio Gutierrez left no child. It was also alleged that on or about the 22nd day of June, 1906, in the Territory of New Mexeco, the said Antonio Gutierrez was in the employ of the defendant railroad company and on
128 that day was riding upon a flat-car at the direction and command of the servants and agents of the railroad company for the purpose of being transported to another place on the said road in order to engage in the work of repairing the track. That on the said date the agents and employés of the defendant railroad company, who were engaged in handling and controlling the train in which the said car was, by their negligence in making a flying switch without giving notice to the said Antonio Gutierrez, caused him to fall upon the track of the said road and to be run over by one of its cars and thereby killed. Proper allegations were made of his earning capacity and all the facts necessary to entitle the plaintiff to recover, except that there was no allegation that he had made affidavit and given notice to the company, as required by a statute of the Territory of New Mexico, which statute prescribed that no right of action should accrue to any person on account of such an accident unless the affidavit prescribed should be made within ninety days from the date of the injury.

The defendant excepted to the plaintiff's petition on several grounds among them that she could not recover as administratrix of the estate of the deceased. The railroad company also pleaded the statute of the Territory of New Mexico to the effect that the plaintiff, in order to entitle her to recover, must have made an affidavit and given the notice prescribed in the statute which it is alleged had not been done. The allegation set out the substance of the statute in detail which it is not necessary to repeat here. Plaintiff excepted to that portion of the answer which set up the statute of New Mexico as a defense and the trial court sustained the exception. Plaintiff also filed a supplemental petition in which she alleged that at the time of the accident the act of Congress known as the Employer's Liability Act, approved June 11, 1906, was in force in the Territory of New Mexico.

129 The judge of the district court gave a charge to the jury in which he virtually submitted the plaintiff's case upon

the act of congress above stated. The jury returned a verdict for $3500.00 in favor of the plaintiff and judgment was entered accordingly, which judgment the Court of Civil Appeals reversed and remanded the cause, from which judgment Associate Justice Fly dissented. The validity of the act of Congress of June 11, 1906, before mentioned, was involved in this litigation.

The railroad company in its brief, presented to the Court of Civil Appeals set up no question of fact except that the plaintiff had failed to prove that she made and presented an affidavit required by the law of New Mexico, which was not controverted. The following questions of law are presented to the court in that brief: (1) That the plaintiff, as administratrix of the estate of the deceased, could not maintain her action in the courts of Texas; (2) That under the law of the Territory of New Mexico she had no right of action because she had failed to make the affidavit required by law, and (3) that the trial court erred in submitting the case upon the act of Congress before mentioned.

The Congress of the United States enacted a statute from which we make the following extract, which statute was approved June 11, 1906:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of
130 Columbia and any State or States or foreign nations, shall be liable to any of its employes, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employes, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works."

At common law the widow of Antonio Gutierrez would have no right of action on account of the death of her husband. She must rely upon the statute of the Territory of New Mexico, or upon the act of the Congress of the United States, commonly known as the Employer's Liability Act, hereafter called the liability act. In her suit she has claimed a recovery under each of said laws. In order to recover under the act of the Territorial Legislature the plaintiff must show that she has complied with all of the conditions which that act imposed upon her, and, having failed to make such proof in the fact that she has not made the affidavit required by the statute nor given the notice to the railroad company which that statute made a condition precedent to the vesting of her right, she cannot recover under that law.

At the death of Antonio Gutierrez the Act of Congress known as the liability act, (if valid), was in force in the Territory of New Mexico. By the terms of that act a right of action was given to the "personal representative" of the deceased and the plaintiff could

sue as the administratrix of the estate of Antonio Gutierrez for the use of herself as widow there being no child. It is claimed by the defendant that the Act of Congress was declared void by the Supreme Court of the United States in the Employers' Liability Cases, 207 U. S., 463, and the Court of Civil Appeals so held in this case.

131 The first question for us to determine is, does the decision in the Liability Cases cited declare the statute invalid in its application to the Territories. Of course, the decision of the Supreme Court of the United States upon that question will be followed by this Court.

It is true that in the case cited the Supreme Court of the United States held the act of Congress, as applied to interstate commerce, to be void. That court said: "Now, the rule which the statute establishes for the purpose of determing whether all the subjects to which it relates are to be controlled by its provisions is that (if) any one who conducts such business be a "common carrier engaged in trade or commerce in the District of Columbia or in any Territory of the United States or between the several states'" etc. "That is, the subjects stated all come within the statute when the individuat or corporation is a common carrier who engages in trade or commerce between the states. * * * Stated in another form, the statute is addressed to the individuals or corporations who are engaged in interstate commerce and is not confined solely to regulating the interstate commerce business which such persons may do—that is, it regulates the persons because they engage in interstate commerce and does not alone regulate the business of interstate commerce. It is evident that the court considered the act only as it affected those who were engaged in interstate commerce and had not in mind that portion of the statute which relates to the Territories or the District of Columbia. As showing that the scope of the decision must be limited to interstate commerce and matters connected with it we note the fact that of the five judges who constituted the majority that made the decision Justices Peckham and Brewer concurred only in the result. Justice Peckham said: "I concur in the proposition, that as to traffic or matters within the State, the act is un-

132 constitutional, and it cannot be separated from that part which is claimed to be valid as relating to interstate commerce. As that is all that is necessary to decide in this case, I place my concurrence upon that part of the opinion which decides it." Justice Brewer concurred with Mr. Justice Peckham, so that of the five who rendered the opinion only three endorsed it as a whole. This results in limiting the effect of the opinion to the subject stated by Mr. Justice Peckham; that is, to traffic or commerce within a State by corporations or persons engaged in interstate commerce. It is manifest that the Supreme Court of the United States did not decide the question before us. It rests with this court to determine whether the part of the bill which relates to the Territories is so separable from that which was held invalid as to stand notwithstanding the invalidity of a portion of the law.

Subdivision 4 of Section 8, Article I, of the Constitution of the United States reads: "The Congress shall have power to regulate commerce with foreign nations, and among the several States, and

with the Indian tribes." In the exercise of the power conferred by that provision Congress enacted that portion of the Employers' Liability Act which declared that "common carriers engaged in commerce between the States, etc., shall be liable to any *to* their employes" etc. That language was by the Supreme Court of the United States in the Employers' Liability Cases held to embrace injuries which might be received by employes of such carriers when not engaged in commerce between the States, therefore, the court held that the law exceeded the powers of Congress and was void. Because the liability to the two classes of employes was inseparably blended in the language of the act the court held that the provision with regard to liability of carriers engaged in interstate commerce was void as a whole.

133 Congress is by the constitution invested with full power to legislate for and make all rules and regulations necessary for the government of the Territories of the United States. In the exercise of that power Congress in enacting the Employers' Liability law provided for the liability of carriers, engaged in commerce within the Territories, to any of their employes, whether engaged in interstate commerce or otherwise. This part of the act being strictly within the powers of Congress must be held valid unless it is rendered invalid by reason of its being inseparably connected with that portion of the act which is void. We will now proceed to examine the relation which these two provisions bear to each other.

Thus we see that the liability law is the product of two distinct powers, embracing two distinct subjects, and might with propriety have been enacted into separate statutes, indeed for construction and application it must be divided thus: "That every common carrier engaged in trade or commerce in the District of Columbia or in any Territory of the United States * * * shall be liable to any of its employés" etc. This is a complete law with regard to the liability of carriers within the Territories and its separation from the other portions of the statute does not in the least impair either, but there remains in fact ample provision as to the liability of the carrier engaged in commerce between the States, which would read: "That every common carrier engaged in trade or commerce * * * between the several States or between any Territory and another or between Any Territory or Territories and Any State or States, or the District of Columbia, or with any Foreign Nation, or between the District of Columbia or State or States or Foreign Nations, shall be liable etc." The learned judge who wrote the opinion in the Employers' Liability Cases so separated these subjects by not

134 considering the portion we have under examination. Indeed, that law cannot be applied to either class of employers without separating the provisions as above: the terms of one clause cannot be applied to the subject of the other.

The provision of the law under which defendant in error claims damages being independent of the invalid clause, we will presume that Congress would have enacted the valid part without that which was condemned by the court. Congress was not only authorized to legislate for the Territories, but it was its duty to do so, and we are

unable to see any reason for supposing that that body would not have performed the duty in this instance.

In a well considered and able opinion by Chief Justice Shepherd the Court of Appeals for the District of Columbia has sustained the validity of the employers' liability law in its application to that district. Hyde v. Southern Ry. Co. Hanly v. Railway Co., 187 U. S., 617.

The Court of Civil Appeals erred in reversing the judgment of the district court. It is therefore ordered that the judgment of the Court of Civil Appeals be reversed and the judgment of the district court be affirmed.

T. J. BROWN,
Associate Justice.

Endorsed: No. 1933. Enedina Gutierrez, Admx. vs. El Paso & N. E. Ry. Co. Opinion. Judgment Court of Civil Appeals reversed: Judgment of District Court affirmed. Filed in Supreme Court of Texas March 24th, 1909. F. T. Connerly, Clerk—Mr. Justice Brown.

135 *Judgment.*

March 24th, 1909.

No. 1933.

ENEDINA GUTIERREZ, Adm'x,
vs.
EL PASO & N. E. RY. CO.

From El Paso Co., 4th District.

Opinion Delivered by Associate Justice Brown.

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Fourth Supreme Judicial District, and the original transcript in said cause being before the Court, as well as the transcript showing the proceedings had in said Court of Civil Appeals, and these having been duly considered, because it is the opinion of this Court that there was error in the Judgment of the Court of Civil Appeals but that there was no error in the Judgment of the District Court, it is therefore considered, adjudged and ordered that the Judgment of the Court of Civil Appeals be reversed and the Judgment of the District Court be affirmed: That the plaintiff in error, Enedina Gutierrez, Administratrix of the estate of Antonio Gutierrez, deceased, do have and recover of and from the Defendant in error, The El Paso and Northeastern Railway Company and its sureties, J. F. Williams and U. S. Stewart, the Amount adjudged in the District Court, together with all costs in this behalf expended in this court, and in the Court of Civil Appeals, and this decision be certified to the District Court for observance.

136 *Motion for Rehearing by Defendant in Error.*

Filed Apr. 6th, 1909.

In the Supreme Court of the State of Texas.

No. —.

ENEDINA GUTIERREZ, Plaintiff in Error,
vs.
EL PASO AND NORTHEASTERN RAILWAY COMPANY, Defendant in Error.

Motion for Rehearing by Defendant in Error.

Now comes the defendant in error in the above styled and numbered cause, and moves the court to set aside the judgment rendered and entered in this cause on the 24th day of March, A. D. 1909, and grant it a rehearing herein, and to affirm the judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas, and reverse the judgment of the District Court of El Paso County, Texas, and rendered judgment herein for defendant in error, or remand this cause to the said District Court for a new trial, for the following reasons, to-wit:

First. This Honorable Court erred in not sustaining defendant in error's first assignment of error, which assignment of error is in words and figures as follows, to-wit:

"The court erred in sustaining the exceptions contained in paragraph two of plaintiff's supplemental petition whereby plaintiff excepted to that portion of the answer of defendant pleading the laws of the Territory of New Mexico as a bar to a recovery.

First proposition under plaintiff in error's first assignment of error.

137 The injuries which resulted in the death of Antonio Gutierrez having been inflicted in the Territory of New Mexico, and said Antonio Guiterrez, having died there, and the Act of Congress invoked by the plaintiff being void, the liability or non-liability of the defendant in damages was determinable by the laws of said Territory, and it was an error for the court to sustain the exceptions or demurrer to the plaintiff in error's pleadings setting up said laws in bar.

Statement.

Defendant in error alleges in her petition that Antonio Guiterrez was injured and killed in the Territory of New Mexico. (See Plaintiff's original petition, Tr. of Record, Page 2.)

Plaintiff in error set up in bar of the action a certain statute of the Territory of New Mexico alleged to have been in existence at the time when the deceased Antonio Guiterrez, was injured and killed, to the effect, in substance that there should be no civil liability, under

either the common law or any statute of the Territory of New Mexico, on the part of any person or corporation for any personal injuries inflicted or death caused by such person or corporation unless the person claiming damages therefor should, within ninety days thereafter, make and serve upon the person or corporation against whom the same is claimed, and at least thirty days before commencing suit to recover damages therefor, an affidavit, which should be made before some officer authorized to administer oaths, and in which affiant should state his name and address and certain other facts.

Plaintiff in error alleged that such affidavit had not been made or served as required by such law, and that, therefore, plaintiff in error is not liable to defendant in error. (See defendant's answer, Tr. of Record, Pages 7-11.)

138 To this answer defendant in error filed a supplemental petition in which she demurred to that part of the answer setting up the territorial laws of New Mexico on the following grounds:

First. Because said laws were superceded by the Acts of Congress.

Second. Because said territorial laws, in so far as they deny the right to sue in Texas for injuries occurring in the Territory of New Mexico, and in so far as they require a person having a cause of action occurring therein to make a trip to New Mexico, are unconstitutional and void.

Third. Further pleading in said supplemental petition, she alleged that the death of Antonio Gutierrez, of whose estate she is the legal representative, occurred since the passage of the Act of Congress of June 11th, 1906, prescribing certain liabilities of certain common carriers to their employés in certain cases, which makes and prescribes the circumstances under which employés of railroad companies engaged in commerce in a Territory, or their legal representatives, if death occurs, which law is exclusive of and repeals the other laws of the Territory of New Mexico which are pleaded by the defendant. (See Tr. of Record, Pages 11-12.)

Said exception of defendant in error to plaintiff in error's answer was sustained by the court. (See Judgment of Court, Tr. of Record, Pages 22-23.)

Authorities.

Atchison, Topeka & Santa Fe Ry. Co. vs. I. I. Mills, rendered by this court.
Howard vs. Railway, 207 U. S., 463.
Western Union Tel. Co. vs. Mitchell, 89 Texas, 441.

Argument.

In addition to the argument contained in our brief filed in
139 the Court of Civil Appeals and supplementing the oral argument presented to this court, we desire to say briefly, in our opinion, the judgment of this court is in error, for this reason, if for none other, that the Federal Employers' Liability Act, not confining itself to employés while actually engaged in interstate com-

merce and in the dangerous employment, is class legislation, and is in violation of the Fifth Amendment to the constitution of the United States which inhibits class legislation by the Congress of the United States. It is undoubtedly within the power of the Legislature to classify persons and legislate with reference to a given class and prescribe different classes, but it is familiar doctrine that such classification must be reasonable and based upon some real distinction and cannot be arbitrarily or capriciously made. Under the Employers' Liability Act a railroad company is arbitrarily singled out and is burdened with a much heavier liability to its employés than that imposed upon other citizens. To illustrate. If a railroad company is digging a well far removed from its tracks and right next to that well a private citizen or private corporation is digging another well the liability of the railroad company to its employee who is injured while in the process of digging such well is determined by the harsh provisions of the Employers' Liability Act. There is absolutely no distinction as to danger or any other reason why such classification should be made with reference to employés of that kind, and we earnestly submit to the court that the Employers' Liability Act for this reason alone is void not only as to the States but to the Territories as well, and it should be only valid provided its scope was confined to employés of railroad companies while actually engaged in the necessarily dangerous work of operating a railroad itself.

Second. This Honorable Court erred in not sustaining defendant in error's second assignment of error, which assignment of error is in words and figures as follows, towit:

140 "Because the court erred in sustaining the first exception contained in plaintiff's supplemental petition to the effect that the laws of the Territory of New Mexico pleaded by the defendant were superceded by said Acts of Congress, for the reason that said Acts of Congress were unconstitutional and void.

Statement.

Plaintiff in error adopts as its statement under this assignment its statement under plaintiff in error's first proposition under its first assignment of error."

Third. This Honorable Court erred in not sustaining defendant in error's third assignment of error, which assignment of error is in words and figures as follows, to-wit:

"Because the court erred in sustaining the exceptions of the plaintiff contained in plaintiff's supplemental petition filed on the 23rd day of November, 1907, to the amended answer of the defendant wherein the territorial laws of the Territory of New Mexico were pleaded."

Statement.

Plaintiff in error adopts as its statement under this assignment of error its statement under its first proposition under its first assignment of error."

Fourth. This honorable court erred in not sustaining defendant in error's fourth assignment of error, which assignment is in words and figures as follows, to-wit:

The Court erred in not giving special charge No. 1 asked by the defendant, wherein the defendant requested the court to instruct the jury to find a verdict in its favor, for the reason that under the laws of the State of Texas an administratrix of the estate of a deceased person cannot recover damages for injuries causing the death of such deceased person and this being a suit by the administratrix of
the deceased, Antonio Guiterrez, the court should have given
141 the charge requested and instructed the jury to find a verdict in favor of the defendant.

Fifth. This Honorable Court erred in not sustaining defendant in error's fifth assignment of error, which assignment is in words and figures as follows, to-wit:

"Defendant further assigns as a fundamental error that the court erred in its general charge to the jury in instructing the jury that they could find for the plaintiff because, under no circumstances, was the plaintiff entitled to recover in this case.

Statement.

Plaintiff in error adopts as its statement under this assignment of error its statement under its first proposition its first assignment of error, and the statement under its fourth assignment of error."

Sixth. This Honorable Court erred in not sustaining defendant in error's sixth assignment of error, which assignment is in words and figures as follows, to-wit:

The court committed a fundamental error in the trial of this case in submitting to the jury as the law in this case what is known as the Federal Employers' Liability Act, because the same is unconstitutional and void, for by its charge the court submitted to the jury as the law in this case the Federal Employers' Liability Act. (See charge of court, Tr. of Record, Pages 12, 20)."

Seventh. This Honorable Court erred in not sustaining defendant in error's seventh assignment of error, which assignment is in words and figures as follows, to-wit:

"The defendant assigns as a fundamental error the following:

The plaintiff, the administratrix of the estate of Antonio Guiterrez, deceased, could not maintain this suit or any suit for the
142 recovery of damages caused by injuries resulting in the death of Antonio Guiterrez, but such suit could only be maintained by the widow, parents or children of the deceased, and the court should have instructed the jury, therefore, to find a verdict for the defendant.

Statement.

Plaintiff in error adopts as its statement under this assignment of error its statement under its first proposition under its first assignment of error, and its statement under its fourth assignment of error, and in addition, the following:

Plaintiff in error requested the court to instruct the jury to return a verdict for the defendant, which request the court refused. (See plaintiff in error's charge No. 1 which was refused by the court, Tr. of Record, Page 22)."

Eighth. This Honorable Court erred in not sustaining defendant in error's assignment of error No. eight, which assignment is in words and figures as follows, to-wit:

"The court erred in not sustaining defendant's motion for a new trial because the verdict was not supported by the testimony, for the reason that plaintiff, as administratrix of the estate of the deceased, having no right of action to recover damages for the death of the deceased, the court should have sustained defendant's motion for a new trial.

Statement.

See statement under the first assignment of error and under the fourth assignment of error."

Ninth. The Honorable Court erred in not sustaining defendant in error's motion for a new trial because the verdict was contrary to the testimony, for the reason that plaintiff, as administratrix of the estate of the deceased, having no right of action to recover damages for the death of the deceased, the court should have sustained defendant's motion for a new trial.

143 Statement.

See statement under first assignment of error and under the fourth assignment of error," and for the further reason that under the laws of Texas (Rev. Stat., Section 3023) plaintiff must affirmatively show such facts as would entitle her to maintain her suit as administratrix, and, having failed to do so, it was fundamental error for the District Court to refuse to give special instruction No. 1 requested by the defendant in the court below.

Wherefore: Defendant in error prays that it be granted a rehearing and that the judgment rendered by this court revising the Court of Civil Appeals and affirming the judgment of the District Court of El Paso County, Texas, be reversed and judgment here rendered for the defendant in error or that same be remanded to the trial court for a new trial.

Respectfully submitted,

HAWKINS & FRANKLIN,
Att'ys for Defendant in Error.

Endorsed: Mo. No. 2065. Enedina Gutierrez, Admx. vs. El Paso & N. E. Ry. Co. Motion for rehearing by Def't in error. Filed in Supreme Court April 6, 1909, F. T. Connerly, Clerk, by J. S. Myrick, Deputy. Overruled April 14, 1909. Service accepted. Time waived. Submitted Apr. 7, 1909.

144 *Acceptance of Service of Motion for Rehearing.*

Filed Apr. 7th, 1909.

In the Supreme Court of Texas.

ENEDINA GUTIERREZ, Plaintiff in Error,
vs.
E. P. & N. E. RY. CO., Defendant in Error.

Now comes the plaintiff in error, and accepts service of a copy of the motion for a rehearing filed in this cause by the defendant in error, and hereby waives the five days, after filing of service or acceptance of service before submission of motion and for the plaintiff in error agrees that the motion for rehearing may be submitted at once upon the filing of this acceptance of service thereof.

F. G. MORRIS,
Att'y for Plaintiff in Error.

Endorsed: Enedina Gutierrez, Plaintiff in Error vs. El P. & N. E. Ry. Co. Defendant in Error. Acceptance of service of motion for rehearing and agreement to immediate submission of the motion. Filed in Supreme Court Apr. 7, 1909. F. T. Connerly, Clerk. By J. S. Myrick, Deputy.

145 *Order Overruling Motion for Rehearing.*

April 14, 1909.

Mo. No. 2065. No. 1933.

ENEDINA GUTIERREZ, Adm'x,
vs.
EL PASO & N. E. RY. CO.

From El Paso Co., 4th District.

This day came on to be heard the motion of the defendant in error, for a rehearing, and the same having been duly considered it is ordered that said motion be overruled; that the defendant in error, The El Paso & Northeastern Railway Company and its sureties, J. F. Williams and U. S. Stewart, pay all costs incurred on this motion.

146 *Petition for Writ of Error.*

Filed May 20th, 1909.

No. 1933.

In the Supreme Court of the State of Texas.

ENEDINA GUTIERREZ, Administratrix of the Estate of Antonio Gutierrez, Deceased, Plaintiff in Error,

vs.

EL PASO & NORTHEASTERN RAILWAY COMPANY, Defendant in Error.

Petition for Writ of Error Presented to the Hon. R. R. Gaines, Chief Justice of the Supreme Court of Texas.

Your petitioner, the El Paso & Northeastern Railway Company, incorporated under the laws of the Territory of New Mexico respectfully shows to the court:

That on the 19th day of April 1907, Enedina Gutierrez, Administratrix of the Estate of Antonio Gutierrez, deceased, instituted suit in the District Court of El Paso County, Texas, against the El Paso & Northeastern Railway Company for the recovery of damages by the plaintiff as administratrix for the benefit of herself as the
147 widow of the deceased Antonio Gutierrez, the petition alleging that Antonio Gutierrez left no child and that about June 22, 1906, while working as an employee of the defendant Railway Company in the territory of New Mexico, he was killed through the negligence of the agents and employees of said company while he was riding upon a flat car on the road of the defendant, and while the agents and employees referred to were engaged in handling and controlling the train of which the flat car constituted a part.

Plaintiff relied upon the Act of Congress approved June 11, 1906, for her authority to maintain this suit as the personal representative of her deceased husband, but did not allege that the plaintiff had made affidavit and given notice to the Railway Company, as required by a statute of the territory of New Mexico, which statute prescribed that no right of action should accrue to any person on account of such an accident unless the prescribed affidavit had been made within ninety days from the date of the injury.

Defendant excepted to the petition on several grounds, among them being that plaintiff could not recover as administratrix of the estate of the deceased; it also pleaded as a defense to the suit the statute of the territory of New Mexico above referred to and alleged that it had not been complied with.

Plaintiff excepted to the portion of the Answer setting up the statute of New Mexico as a defense, and this exception was sustained by the trial court.

The trial judge submitted the case to the jury upon the Employers' Liability Act of Congress above referred to and a verdict was rendered in favor of plaintiff for $3500. The defendant appealed from this judgment to the Court of Civil Appeals of the State of

Texas, and gave a supersedeas bond in the sum of $8000 with J. F. Williams and U. S. Stewart as sureties, and the Court of Civil
147½ Appeals reversed and remanded the cause on the ground that the Act of Congress of June 11, 1906, was unconstitutional in toto and gave no authority to plaintiff to sue as survivor. A writ of error was perfected to the Supreme Court of the State of Texas, and on March 24, 1909, it reversed the judgment of the Court of Civil Appeals and affirmed the judgment of the trial court, rendering judgment against said defendant Railroad Company and its sureties for the amount adjudged in favor of plaintiff by the District Court and all costs. Thereafter, on the 6th day of April A. D. 1909, the El Paso & Northeastern Railway Company filed a motion for rehearing in the Supreme Court of the State of Texas, and on the 14th day of April A. D. 1909, same was overruled.

The judgment of the Supreme Court of Texas is a final judgment, it is the highest court of the State of Texas in which a decision in the suit could be had, and is now the custodian of the record in the cause.

That petitioner is aggrieved by the judgment by said Supreme Court of Texas and the proceedings had prior thereto in said cause, and in said judgment and proceedings errors were committed to the prejudice of petitioner, because in said suit there were drawn in question the validity of a statute of and of an authority exercised under the United States and the decision was against their validity, and because titles, rights, privileges and immunities were in said suit specially set up and claimed by said Railroad Company under the constitution and laws of the United States, and the decision by said Supreme Court of Texas in said suit was against said titles, rights, privileges and immunities so specially set up and claimed all of which appears from the transcript of the proceedings in said suit and the accompanying file papers and copies of the orders of the different courts, all of which are on file in the Supreme Court of the State of Texas and to which the Chief Justice of that court is hereby respectfully referred, with the request that they be considered in connection with and as a part of this application.

148 Petitioner files herewith assignments of error and prays that the same be considered as a part hereof.

Wherefore your petitioner prays for the allowance of a writ of error to the Supreme Court of the State of Texas, which now has the record in said suit, for the removal of said suit into the Supreme Court of the United States to the end that the errors in said judgment and proceedings in said suit may be duly corrected, and that full and speedy justice may be done to the parties aforesaid in this behalf, and that the amount of bond be fixed, and that the transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, and petitioner prays for citation and supersedeas.

Dated this 19th day of May, A. D. 1909.

HAWKINS & FRANKLIN,
GREGORY, BATTS & BROOKS,
Attorneys for Petitioner, The El Paso & Northeastern Railway Company.

Endorsed: No. 1933. Enedina Gutierrez, Administratrix of the Estate of Antonio Gutierrez, deceased, Plaintiff in error, vs. The El Paso & Northeastern Railway Company, defendant in error. Petition for Writ of Error. Filed in the Supreme Court of Texas, May 20, 1909. F. T. Connerly, Clerk. Gregory, Batts & Brooks Lawyers, Austin, Texas.

Order Allowing Writ of Error.

Filed May 20, 1909.

In the Supreme Court of the State of Texas.

No. 1933.

ENEDINA GUTIERREZ, Administratrix of the Estate of Antonio Gutierrez, Deceased, Plaintiff in Error,

149 vs.

THE EL PASO & NORTHEASTERN RAILWAY COMPANY, Defendant in Error.

Order Allowing Writ of Error.

Upon motion of attorneys for defendant in error, the El Paso & Northeastern Railway Company, and upon its filing a petition for writ of error and assignments of error, it is ordered that the writ of error be and hereby is allowed in accordance with the prayer of its petition and the amount of bond on said writ of error is hereby fixed at $500.00 and on giving of same the judgment of this Court shall be superseded.

R. R. GAINES,
Chief Justice of the Supreme Court of Texas.

Austin, Texas, May 20, 1909.

(Endorsement:) No. 1933. Enedina Gutierrez, Administratrix of the estate of Antonio Gutierrez, deceased, Plaintiff in error vs. The El Paso & Northeastern Railway Co., Defendant in Error. Order allowing writ of Error. Filed in the Supreme Court of Texas May 20, 1909. F. T. Connerly, Clerk. Gregory, Batts & Brooks, Lawyers, Austin, Texas.

150 *Bond on Writ of Error.*

Filed May 20, 1909.

In the Supreme Court of the State of Texas.

Bond on Writ of Error.

No. 1933.

ENEDINA GUTIERREZ, Administratrix of the Estate of Antonio Gutierrez, Deceased, Plaintiff in Error,

vs.

THE EL PASO & NORTHEASTERN RAILWAY COMPANY, Defendant in Error.

Error to the Supreme Court of the State of Texas.

Know all men by these presents, that we, the El Paso & Northeastern Railway Company, incorporated under the laws of New Mexico, as principal and Wm. R. Hamby and Chester Thrasher as sureties, are held and firmly bound unto Enedina Gutierrez, Administratrix of the Estate of Antonio Gutierrez, deceased, in the full and just sum of $500.00 for the payment of which well and truly to be made we bind ourselves, our heirs successors, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated the 20 day of May, A. D. 1909.

Whereas on the 24 day of March, A. D. 1909, in the Supreme Court of the State of Texas in the suit pending in said Court between Enedina Gutierrez, Administratrix of the estate of Antonio Gutierrez, deceased, plaintiff in error, and the El Paso & Northeastern Railway Company, defendant in error, being cause No. 1933 in said Court, a judgment and decision was rendered against said El Paso & Northeastern Railway Company affirming the judgment of the District Court of El Paso County, Texas upon a verdict against said railway company, and a motion for rehearing filed in the Supreme Court of Texas by said Railway Company was overruled by said court on the 14 day of April A. D. 1909; and the

151 said El Paso & Northeastern Ry. Co. has prosecuted and obtained a writ of error from the Supreme Court of the United States to reverse the judgment and decrees rendered in said cause by the Supreme Court of Texas, and filed a copy thereof in the clerk's office of said Supreme Court of Texas to reverse the judgment and decisions in the aforesaid suit, and a citation directed to the said Enedina Gutierrez, Administratrix of the estate of Antonio Gutierrez, deceased, citing and admonishing her to be and appear at the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof.

Now therefore, the condition of the above obligation is such that if the said El Paso & Northeastern Railway Company shall prosecute the said writ of error to effect and answer all damages and costs if

it fails to make its appeal good then the above obligation shall be null and void; otherwise to remain in full force, virtue and effect.

EL PASO & NORTHEASTERN RAILWAY COMPANY,
By T. W. GREGORY, *Attorney.*
WM. R. HAMBY,
CHESTER THRASHER.

Approved by
R. R. GAINES,
Chief Justice of Supreme Court of Texas.

(Endorsed:) No. 1933. Enedina Gutierrez, Administratrix of the Estate of Antonio Gutierrez, deceased, plaintiff in error, vs. The El Paso & Northeastern Railway Company, defendant in error. Bond on Writ of Error. Filed in the Supreme Court of Texas May 20, 1909. F. T. Connerly, Clerk. Gregory, Batts & Brooks Lawyers, Austin, Texas.

152 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable, the Judges of the Supreme Court of the State of Texas, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of Texas, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between the El Paso & Northeastern Railway Company, incorporated under the laws of New Mexico, defendant and defendant in error, and Enedina Gutierrez, Administratrix of the estate of Antonio Gutierrez, deceased, plaintiff and plaintiff in error, which judgment affirmed a judgment of the District Court of El Paso County, Texas, upon a verdict against said Railway Company and other proceedings therein, being cause No. 1933 in said Supreme Court of the State of Texas, wherein was drawn in question the validity of a statute of, and an authority exercised under, the United States, and the decision was against their validity; and wherein was drawn in question the construction of a clause of the constitution and statute of the United States, and the decision was against the rights, privileges and immunities specially set up and claimed under such clause of said constitution and statute; a manifest error hath happened to the great damage of the said El Paso & Northeastern Railway Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so

that you have the same in the said Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States the 20th day of May in the year of our Lord Nineteen hundred and Nine.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

D. H. HART,
Clerk of Circuit Court of the United States in and for the Fifth Circuit and Western District of Texas.

153 To operate as a supersedeas on giving bond for $500.00. May 20, 1909.

Allowed by

R. R. GAINES,
Chief Justice of the Supreme Court of Texas.

153½ [Endorsed:] No. 1933. Enedina Gutierrez, Administratrix of the Estate of Antonio Gutierrez, deceased, plaintiff in error, vs. The El Paso & Northeastern Railway Company, Defendant in Error. Writ of Error. Filed in the Supreme Court of Texas, May 20th, 1909. F. T. Connerly, Clerk. Gregory, Batts & Brooks, Lawyers, Austin, Texas.

154 UNITED STATES OF AMERICA, *ss:*

To Enedina Gutierrez, Administratrix of the Estate of Antonio Gutierrez, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Texas in cause No. 1933 in the last mentioned court, wherein Enedina Gutierrez, Administratrix of the Estate of Antonio Gutierrez, deceased, is plaintiff in error and the El Paso & Northeastern Railway Company, incorporated under the laws of New Mexico, is defendant in error to show cause, if any there be, why the judgment rendered against the said defendant in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. R. Gaines, Chief Justice of the Supreme Court of Texas this 20 day of May in the year of our Lord, Nineteen hundred and Nine.

R. R. GAINES,
Chief Justice of the Supreme Court of Texas.

On this — day of May, in the year of our Lord Nineteen hundred and Nine, personally appeared —— —— before me, the subscribed, a notary public within and for El Paso County, State of Texas, said —— —— being an adult person and being sworn by me, makes oath that he delivered a true copy of the within citation to —— —— on said day, and that he, the said —— —— is the duly appointed, qualified and acting Deputy under Eugene Nolte, the United States Marshal for the Western District of Texas and as such Deputy served said copies.

——— ———,
U. S. Marshal, Western District of Texas,
By —— ——, *Deputy.*

Sworn to and subscribed before me this — day of May, 1909.

——— ———,
Notary Public, El Paso County, Texas.

Service of the above writ is hereby accepted and receipt of copy of citation in error acknowledged and further service of citation in error waived on this 24" day of May, A. D. 1909.

F. G. MORRIS,
Solicitor and Attorney for Enedina Gutierrez, Administratrix of the Estate of Antonio Gutierrez, Deceased, Plaintiff in Error in the Supreme Court of Texas.

[Endorsed:] No. 1933. Enedina Gutierrez, Administratrix of the Estate of Antonio Gutierrez, deceased, Plaintiff in Error versus The El Paso & Northeastern Railroad Company, Defendant in Error. Citation in Error. (Original.) Filed in the Supreme Court of Texas May 28th, 1909. F. T. Connerly, Clerk. (Service accepted, &c.)

155 *Assignments of Error.*

Filed May 29, 1909.

In the Supreme Court of the State of Texas.

No. 1933.

ENEDINA GUTIERREZ, Administratrix of the Estate of Antonio Gutierrez, Deceased (Plaintiff), Plaintiff in Error,
vs.
THE EL PASO & NORTHEASTERN RAILROAD COMPANY (Defendant), Defendant in Error.

Assignments of Error.

Petitioner for writ of error from the Supreme Court of the United States in the above entitled and numbered cause, the El Paso & Northeastern Railway Company, says that in the record and proceed-

ings therein and in giving and affirming the judgment rendered therein by the District Court of El Paso County, Texas, there was manifest error in this—

1. That it was decided in and by the judgment of the District Court of El Paso County, and by the Supreme Court of the State of Texas in affirming said judgment and overruling petitioner's motion for a rehearing, that the act of the legislature of New Mexico passed March 11, 1903 (Chapter 23, Acts of 35th Legislative Assembly of New Mexico) did not have to be complied with by plaintiff in order to prosecute this suit in the State of Texas, and by said judgments and proceedings the Supreme Court of Texas, in refusing to enforce the territorial statute, denied to petitioner a federal right guaranteed by the constitution and statute of the United States requiring that such faith and credit should be given to said statute in every court within the United States as it had by law or usage in the courts of New Mexico, and thereby there was drawn in question the validity of an authority exercised under the United States, and the decision was erroneously against the validity.

2. That in this cause there was drawn in question the va-
156 lidity of the act of the legislature of New Mexico passed March 11, 1903, requiring affidavit and notice as a condition precedent to the prosecution of a suit for personal injuries, it being claimed by the plaintiffs that said act was repealed and annulled by the act of Congress approved June 11, 1906; this contention of the plaintiff was erroneously sustained by the judgment of the district court of El Paso County, and by the Supreme Court of the State of Texas in affirming that judgment and overruling petitioner's motion for a rehearing, and these decisions were against the validity of said act of the legislature of New Mexico, and thus against the validity of an authority exercised under the United States, whereas the validity of said act of the legislature of New Mexico, as contended for by said Railway Company, should have been sustained.

3. That it was erroneously decided in and by the judgment of the District Court of El Paso County, and by the Supreme Court of the State of Texas in affirming said judgment and overruling petitioner's motion for a rehearing, that the act of the legislature of New Mexico passed March 11, 1903, requiring affidavit and notice as a condition precedent to the prosecution of a suit for personal injuries, was repealed and superseded by the Act of Congress approved June 11, 1906, and thereby the Supreme Court of Texas decided against a right privilege and immunity specially set up and claimed by the defendant railroad company under the constitution and authority exercised under the United States.

4. That in this case the defendant railroad company relied upon and specially set up and claimed as a defense to this suit the act of the legislature of New Mexico passed March 11, 1903, and the failure on the part of plaintiff to comply with its provisions, thus claiming a right, privilege and immunity under an authority exercised under the United States, and the judgment of the District Court of El
157 Paso County and the decision of the Supreme Court of Texas in affirming said judgment and overruling petitioner's mo-

tion for a rehearing were erroneously against said right, privilege and immunity.

5. That it was erroneously decided in and by the judgment of the District Court of El Paso County, and by the Supreme Court of the State of Texas in affirming said judgment and overruling petitioner's motion for a rehearing that the act of Congress known as the "Employers' Liability Act," approved June 11, 1906, was in force in the territory of New Mexico at the time of the injury in question, and thereby the State Supreme Court decided against a right, privilege and immunity specially set up and claimed by defendant, said railroad company, under the constitution of the United States, to the effect that said act of Congress was void because in violation of and contrary to the constitution of the United States.

6. That said defendant Railroad Company insisted upon a construction under the Federal constitution of the act of Congress approved June 11, 1906, which would have led to a judgment in its favor (viz: that the act as a whole was so connected that it was unconstitutional and void in toto), that this claim so set up by said company was erroneously denied by the State Supreme Court, and thereby it decided against a right, privilege and immunity specially set up and claimed by said company under the constitution of the United States.

7. That the act of Congress approved June 11 1906, known as the "Employers' Liability Act" is not supported by but contrary to the Federal Constitution because it seeks to regulate intra-state commerce; under said constitution it is void in toto, because the several subjects therein dealt with are so interblended as to be incapable of separation; by insisting on the unconstitutionality of the entire act, the railroad company specially set up and claimed a right, privilege and immunity under the Federal Constitution, and the judgment
158 of the District Court of El Paso County and the decisions of the Supreme Court of Texas affirming said judgment and overruling petitioner's motion for a rehearing were erroneously against such right, privilege and immunity.

8. That the Act of Congress approved June 11 1906, known as the "Employers' Liability Act" is not supported by but contrary to the Fifth Amendment of the Federal Constitution because it constitutes, as to the Territory of New Mexico class legislation, and deprives the railroad of its property without due process of law, that the railroad company insisted on the unconstitutionality of said act of Congress and thereby specially set up and claimed the right, privilege and immunity under the Federal Constitution, and the judgment of the District Court of El Paso County and the decisions of the Supreme Court of Texas affirming said judgment and overruling petitioner's motion for a rehearing were erroneously against such right, privilege and immunity.

And the said El Paso & Northeastern Rail[illegible] Company prays that the said judgment of the district court of [illegible] Paso County and the said judgment and decisions of the Supreme Court of Texas, affirming same and overruling petitioner's motion for rehearing for the errors aforesaid and others in the record and proceedings aforesaid may be reversed, annulled, and all together held for nothing.

and that petitioner may be restored to all things which it has lost by occasion of the said judgments and decisions as aforesaid.

HAWKINS & FRANKLIN,
GREGORY, BATTS & BROOKS,
Attorneys for Petitioner, El Paso & Northeastern Ry. Co.

(Endorsed:) No. 1933. Enedina Gutierrez, Administratrix of the Estate of Antonio Gutierrez, deceased, plaintiff in error, vs. The El Paso & Northeastern Railroad Company, defendant in error. Assignments of Error. Filed in the Supreme Court of Texas May 20, 1909. F. T. Connerly, Clerk. Gregory, Batts & Brooks Lawyers, Austin, Texas.

159 Clerk's Office, Supreme Court.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the foregoing 158 pages, except pages 152, 153 and 154, contain a true and correct copy of the transcript of the record of all the proceedings had in the District Court of El Paso County, Texas, in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas at San Antonio Texas, and in the Supreme Court of the State of Texas, as the same appear of record and on file in this Office in Cause No. 1933, entitled, Enedina Gutierrez, Administratrix of Estate of Antonio Gutierrez, Deceased, Plaintiff in Error vs. The El Paso & Northeastern Railway Company, Defendant in Error.

I further certify that the pages herein numbered 152, and 153 is the original writ of error, of which a copy has been lodged and is now on file in this Office, and that the page herein numbered 154, is the original citation in error, a copy of which is now on file in this Office.

In testimony whereof, I have hereto signed my name, and affixed the seal of the Supreme Court of Texas done at the City of Austin, this 5th day of June, A. D. 1909.

[Seal Supreme Court of the State of Texas.]

F. T. CONNERLY,
Clerk of the Supreme Court of Texas.

160 In the Supreme Court of the United States.

No. 505. Oct. Term, 1909.

EL PASO & NORTHEASTERN RAILWAY COMPANY, Plaintiff in Error,
vs.
ENEDINA GUITERREZ, Administratrix, Defendant in Error.

Error to the Supreme Court of Texas.

The plaintiff in error and the defendant in error in the above styled and numbered cause, through their respective counsel, agree and stipulate that the following parts of the record in this cause be

printed for the use of the court and counsel in the further proceedings in this cause, which constitute all of the record that is material to a decision of the questions to be presented to the court for decision.

All of the copies of the record on which the Supreme Court of Texas acted, except what is styled therein "Statement of Facts," extending from page 45 to page 59, incl., which consists of a report of the testimony adduced in the trial court, which will be omitted from the printed record, and in addition to the record which was acted upon by the Supreme Court of Texas, print the following:

(1.) The opinion of the Supreme Court of Texas.

(2.) Assignments of error filed by plaintiff in error in the Supreme Court of Texas.

(3.) Application for writ of error, bond and citation in error and acceptance of service thereon.

(4.) As it has been agreed between the parties hereto that this cause shall be submitted on printed briefs and argument of both parties at the beginning of the October Term, 1909, of this court, the Clerk thereof is respectfully requested to have the record printed at the earliest convenient date.

W. C. KEEGIN,
Counsel for Plaintiff in Error.

161 F. G. MORRIS,
Counsel for Defendant in Error.

162 [Endorsed:] File No. 21,731. Supreme Court U. S. October Term, 1909. Term No. 505. El Paso & Northeastern Railway Company, Pl'ff in Error, vs. Enedina Gutierrez, Administratrix etc. Stipulation to omit part of record in printing. Filed Aug. 5, 1909.

Endorsed on cover: File No. 21,731. Texas Supreme Court. Term No. 505. El Paso and Northeastern Railway Company, plaintiff in error, vs. Enedina Gutierrez, administratrix of the estate of Antonio Gutierrez, deceased. Filed June 18, 1909. File No. 21,731.

SEP 29 1909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

EL PASO & NORTHEASTERN RAILWAY COMPANY, Plaintiff in Error,

vs.

ENEDINA GUTIERREZ, ADMINISTRATRIX OF THE ESTATE OF ANTONIO GUTIERREZ, Deceased.

No. 505.

In Error to the Supreme Court of the State of Texas.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This suit was instituted by Enedina Gutierrez, as administratrix of the estate of Antonio Gutierrez, in the District Court of El Paso County, Texas, against the plaintiff in error, and in her original petition, upon which the case was tried below, the defendant in error alleged that the plaintiff in error was a railroad corporation; that the de-

fendant in error was the administratrix of the estate of Antonio Gutierrez, deceased; that the plaintiff in error was on and prior to June 22, 1906, engaged as a common carrier of commerce in the Territory of New Mexico, and from said Territory into the States adjoining thereto; that Antonio Gutierrez was an employee of the plaintiff in error and that while in the performance of his duties as such employee was injured and killed through the negligence of the plaintiff in error. (Transcript of Record, pp. 1-3.)

To that petition the plaintiff in error interposed an answer, in which it denied the allegations contained in said petition, and also interposed a special plea substantially to the following effect, to-wit:

> "And for further and special answer in this behalf, defendant says that if the said deceased was injured and killed as by plaintiff alleged in her petition, which defendant denies, that then such injuries and death were occasioned within the Territory of New Mexico, and that at the time when he was so injured and killed and on June 22, 1906, and for a long time prior thereto and now, there was and is in existence in said Territory of New Mexico a certain written law and statute, which is in words and figures substantially as follows:
>
> > " 'Section 1. Hereafter there shall be no civil liability under either the common law or any statute of this Territory on the part of any person or corporation for any personal injuries inflicted or death caused by such person or corporation in this Territory, unless the person claiming damages therefor shall within ninety days after such injuries shall have been inflicted make and serve upon the person or corporation against whom the same is claimed, and at least thirty days before commencing suit to recover judgment therefor, an affidavit which shall be made before some officer within this Territory who is authorized to admin-

ister oaths, in which the affiant shall state his name and address, the name of the person receiving such injuries, if such person be other than the affiant, the character and extent of such injuries in so far as the same may be known to affiant, the way or manner in which such injuries were caused in so far as the affiant has any knowledge thereof, and the name and addresses of all witnesses to the happening of the facts or any part thereof causing such injuries as may at such times be known to affiant, unless the person so claiming such damages shall also commence an action to recover the same within one year after such injuries occur, in the District Court of the Territory in and for the County in which such injuries occur, or in and for the County of this Territory where the claimant or person against whom such claim is asserted resides, or in any event such claim is asserted against a corporation, in the County in this Territory where such corporation has its principal place of business; and said suit after having been commenced shall not be dismissed by plaintiff unless by written consent of the defendant filed in the case, or for good cause shown to the court; it being hereby expressly provided and understood that such right of action is given only on the understanding that the foregoing conditions precedent are made a part of the law under which right to recover can exist for such injuries except as herein otherwise provided.'

"And defendant alleges that under and in accordance with said law there is no civil liability under either the common law or any statute or other law of the Territory of New Mexico at this time, and was not on the said 22d day of June, 1906, and when plaintiff claims deceased was injured, on the part of any person or corporation, for any personal injuries inflicted by any such person or corporation, or its servants, agents or employees, on another in said Territory of New Mexico, unless the person claiming dam-

ages therefor, within ninety days after such injuries were inflicted and at least thirty days before commencing suit to recover judgment therefor, made and served upon the person or corporation against whom the said damages were claimed, an affidavit made before some person within said Territory authorized to administer oaths, in which affiant should state his name and address, the name of the person receiving such injuries, if such person be other than the affiant, the character and extent of such injuries, in so far as the same might be known to affiant, the way or manner in which said injuries were caused in so far as affiant has any knowledge thereof, and the name and addresses of all the witnesses to the happening of the facts or any part thereof causing such injuries as might at such time be known to affiant, and unless the person so claiming such damages should also commence an action to recover the same within one year after such injuries occurred in the district court of said Territory in and for the county of said Territory in which said injuries occur, or in and for the county of said Territory where the claimant or person against whom such claim is asserted resides, or in event such claim is asserted against a corporation, in the county of said Territory where such corporation has its principal place of business. And defendant alleges that though the defendant had and maintained a principal place of business in the Territory of New Mexico on the 22d day of June, 1906, and has had and maintained the same since that date, and now has such principal place of business thereat, and there has, and then had an agent upon whom process can be easily had, and though the Territory of New Mexico on the 22d day of June, 1906, ever since that date, and now, has courts in the Territory of New Mexico, under the constitution aforesaid, who have jurisdiction and laws of the United States and the laws of the Territory of New Mexico to determine whether or not the said defendant is liable to the plaintiff in damages or otherwise for the injuries alleged to have been sustained by deceased, and of furnishing to the plaintiff a redress for such

injuries, yet no such affidavit above referred to was ever made or served upon this defendant, though more than ninety days since the happening of the alleged facts which plaintiff says caused the injuries complained of have elapsed, and neither has the said plaintiff instituted any such suit in any district court or other court in said Territory of New Mexico." (Transcript of Record, pp. 6 to 8, inclusive.)

To this special answer the defendant in error interposed by supplemental petition an exception, by which she invoked the Act of Congress of June 11, 1906, which exception was substantially in words and figures as follows:

"And further replying to said answer plaintiff says that the death of the plaintiff's husband of whose estate she is legal representative occurred since the passage of the Act of Congress of June 11, 1906, prescribing liability of certain common carriers to their employees in certain cases, which makes and prescribed the circumstances under which employees of railroad companies engaged in commerce in a Territory, or their legal representatives if death occurs, which law is exclusive of and repeals the other laws of New Mexico which are pleaded by defendant." (Transcript of Record, p. 9.)

Which exception was by the trial court sustained (Transcript of Record, p. 17).

The cause was thereupon tried and submitted to the jury on the issues made by the petition of the defendant in error and all that portion of the answer of the plaintiff in error except the portion pleading the law of New Mexico in bar of the action excepted to, and the same resulted in a verdict and judgment against the plaintiff in error, and in favor of the defendant in error, for $3,500.00 (Transcript of Record, p. 17).

A motion for new trial was duly made and overruled,

and the cause appealed to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas, wherein the judgment was reversed on the ground that the Employers' Liability Act was unconstitutional and void. (See Opinion of the Court of Civil Appeals, Transcript of Record, p. 29.)

A motion for rehearing filed by defendant in error in the Court of Civil Appeals was overruled. (See Opinion of Court, Transcript of Record, p. 39.)

From the judgment of the Court of Civil Appeals aforesaid, an appeal was prosecuted to the Supreme Court of the State of Texas, and the judgment of the Court of Civil Appeals was there reversed and the judgment of the District Court was affirmed, on the ground that the Employers' Liability Act was constitutional insofar as it was applicable to Territories. (See Opinion of Court, Transcript of Record, p. 70.) A Writ of Error was granted by the Chief Justice of the Supreme Court of the State of Texas to this court.

The plaintiff in error filed in the Supreme Court in support of said Writ of Error the following:

ASSIGNMENTS OF ERROR.

"Petitioner for Writ of Error from the Supreme Court of the United States in the above-entitled and numbered cause, the El Paso & Northeastern Railway Company, says that in the record and proceedings therein and in giving and affirming the judgment rendered therein by the District Court of El Paso County, Texas, there was manifest error in this:

"1. That it was decided in and by the judgment of the District Court of El Paso County, and by the Supreme Court of the State of Texas in affirming said julgment and overruling petitioner's motion for a rehearing, that the act of legislature of New Mexico passed March 11, 1903 (Chapter 23, Acts of 35th

Legislative Assembly of New Mexico), did not have to be complied with by plaintiff in order to prosecute this suit in the State of Texas, and by said judgments and proceedings the Supreme Court of Texas, in refusing to enforce the Territorial statute, denied to petitioner a federal right guaranteed by the constitution and statute of the United States requiring that such faith and credit should be given to said statute in every court within the United States as it had by law or usage in the courts of New Mexico, and thereby there was drawn in question the validity of an authority exercised under the United States, and the decision was erroneously against the validity.

"2. That in this cause there was drawn in question the validity of the act of the legislature of New Mexico, passed March 11, 1903, requiring affidavit and notice as a condition precedent to the prosecution of a suit for personal injuries, it being claimed by the plaintiffs that said act was repealed and annulled by the Act of Congress, approved June 11, 1906; this contention of the plaintiff was erroneously sustained by the judgment of the District Court of El Paso County, and by the Supreme Court of the State of Texas in affirming that judgment and overruling petitioner's motion for a rehearing, and these decisions were against the validity of said act of the legislature of New Mexico, and thus against the validity of an authority exercised under the United States, whereas the validity of said act of the legislature of New Mexico, as contended for by said railway company, should have been sustained.

"3. That it was erroneously decided in and by the judgment of the District Court of El Paso County, and by the Supreme Court of the State of Texas in affirming said judgment and overruling petitioner's motion for a rehearing, that the act of the legislature of New Mexico, passed March 11, 1903, requiring affidavit and notice as a condition precedent to the prosecution of a suit for personal injuries, was repealed and superseded by the Acts of Congress, approved June 11, 1906, and thereby the Supreme Court of Texas decided against a right privilege and immunity specially

set up and claimed by the defendant railroad company under the constitution and authority exercised under the United States.

"4. That in this case the defendant railroad company relied upon and specially set up and claimed as a defense to this suit the act of the legislature of New Mexico, passed March 11, 1903, and the failure on the part of plaintiff to comply with its provisions, thus claiming a right, privilege and immunity under an authority exercised under the United States, and the judgment of the District Court of El Paso County and the decision of the Supreme Court of Texas in affirming said judgment and overruling the petitioner's motion for a rehearing were erroneously against said right, privilege and immunity.

"5. That it was erroneously decided in and by the judgment of the District Court of El Paso County, and by the Supreme Court of the State of Texas in affirming said judgment and overruling petitioner's motion for a rehearing that the Act of Congress known as the 'Employers' Liability Act,' approved June 11, 1906, was in force in the Territory of New Mexico at the time of the injury in question, and thereby the State Supreme Court decided against a right privilege and immunity specially set up and claimed by defendant, said railroad company, under the constitution of the United States, to the effect that said Act of Congress was void because in violation of and contrary to the constitution of the United States.

"6. That said defendant railroad company insisted upon a construction under the Federal constitution of the Act of Congress, approved June 11, 1906, which would have led to a judgment in its favor (viz.: that the act as a whole was so connected that it was unconstitutional and void in toto), that this claim so set up by said company was erroneously denied by the State Supreme Court, and thereby it decided against a right, privilege and immunity specially set up and claimed by said company under the constitution of the United States.

"7. That the Act of Congress, approved June 11, 1906, known as the 'Employers' Liability Act' is not supported by but contrary to the Federal Constitution because it seeks to regulate intra-state commerce; under said constitution it is void in toto, because the several subjects therein dealt with are so interblended as to be incapable of separation; by insisting on the unconstitutionality of the entire act, the railroad company specially set up and claimed a right, privilege and immunity under the Federal Constitution, and the judgment of the District Court of El Paso County and the decisions of the Supreme Court of Texas affirming said judgment and overruling petitioner's motion for a rehearing were erroneously against such right, privilege and immunity.

"8. That the Act of Congress, approved June 11, 1906, known as the 'Employers' Liability Act,' is not supported by but contrary to the Fifth Amendment of the Federal Constitution because it constitutes, as to the Territory of New Mexico class legislation, and deprives the railroad of its property without due process of law, that the railroad company insisted on the unconstitutionality of said act of Congress and thereby specially set up and claimed the right, privilege and immunity under the Federal Constitution, and the judgment of the District Court of El Paso County and the decisions of the Supreme Court of Texas affirming said judgment and overruling petitioner's motion for a rehearing were erroneously against such right, privilege and immunity.

"And the said El Paso & Northeastern Railway Company prays that the said judgment of the District Court of El Paso County and the said judgment and decisions of the Supreme Court of Texas, affirming same and overruling petitioner's motion for a rehearing for the errors aforesaid and others in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that petitioner may be restored to all things which it has lost by occasion of the said judgments and decisions as aforesaid."

ARGUMENT.

There are three questions presented for consideration of the court in this case, to-wit:

First. Has this court jurisdiction to review the judgment of the Supreme Court of Texas rendered in this case?

Second. Is the Act of Congress, commonly known as the Employers' Liability Act, of June 11, 1906 (34 Stats., 232), totally unconstitutional and void, or is it valid in so far as the Territories are concerned?

Third. Did the courts of the State of Texas err in failing to give full faith and credit to the statute of New Mexico pleaded by the plaintiff in error?

It was urged by counsel for defendant in error in opposition to the granting of the Writ of Error before the Chief Justice of the Supreme Court of the State of Texas, and we assume that same will be insisted upon by brief here, that this court has no jurisdiction to review the judgment of the Supreme Court of Texas, on the theory that the judgment of the Supreme Court of the State of Texas was in favor of, and not against, the validity of the Act of Congress of June 11, 1906. To this contention there are several answers.

The first is that the plaintiff in error plainly claimed a right, privilege and immunity under the constitution and statutes of the United States, and the decision of the courts of Texas is against such claim. It appears from the pleadings of the defendant in error, and especially from her supplemental petition (see Transcript of Record, p. 8) that she invoked the Employers' Liability Act of Congress and claimed a right thereunder. On the other hand, the plaintiff in error asserted and continued to assert that said Act was unconstitutional, and that it was not liable in damages to the defendant in error in any case based on said Act, for the reason that the same was void. This claim of

the plaintiff in error that the Act was unconstitutional is the claim of an immunity and right within the meaning of Section 709 of the Compiled Statutes of the United States.

In the case of St. L. & I. M. Ry. Co. vs. Taylor (210 U. S., 281, 293), supra, it was held by this court that:

> "Where a party to litigation in a State court insists by way of objection to, or requests for instruction upon, a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the State, then the question thus raised may be reviewed in this court. The plain reason is that in all such cases he has claimed in a State court a right or immunity under the laws of the United States and it has been denied to him. Jurisdiction so clearly warranted by the constitution and so explicitly conferred by the Act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union."

It seems to us that this decision of the court forecloses the question as to whether or not this court has jurisdiction. See, also, Illinois Central R. R. Co. vs. McKendree (203 U. S., 514.)

The necessity for this court's taking jurisdiction in a case where a party claims an immunity from liability in a case where the plaintiff alleges that the liability arises under the laws of the Congress of the United States is manifest. If any other doctrine obtain, the courts of one State, it is conceivable, might hold that the Employers' Liability Act was constitutional, even in the very teeth of the decision of this

court that it is not, and the results would be that in some States the Act of Congress would be valid because so held by their courts, and in other States it would be void, and the uniformity of its application throughout the Union would be thereby destroyed.

The law pleaded by the plaintiff in error in its answer was the statute of New Mexico requiring that notice be given by a person claiming damages for personal injuries or death within ninety days to the person against whom the claim was made, and providing that the giving of such notice was a condition precedent to the right of action, and that no right of action so arose in favor of the claimant unless such notice was given. Said law was before this court in the case of A. T. & S. F. Ry. Co. vs. Sowers, decided at the last term (213 U. S., 55), and was there fully considered by the court and upheld as valid.

This statute was specially pleaded by the plaintiff in error in the trial court, and the attention of the trial court thereby specially directed to it, and said court was expressly advised that the plaintiff in error claimed that the right of action of the defendant in error was barred by reason of the failure of the defendant in error to comply with the conditions of said statute; which failure was also specially alleged in said answer, and the plaintiff in error expressly invoked the provisions of said statute, and complained that its provisions had not been complied with. To the plea the defendant in error filed a special demurrer, or exception, as the same is denominated in pleadings in Texas, on the ground that the Employers' Liability Act aforesaid repealed or suspended the Act of the Territory of New Mexico pleaded by plaintiff in error. This demurrer was expressly presented to the trial court and its judgment invoked and that court sustained said demurrer, and its action in so doing was a deliberate and explicit failure to give full faith and credit to the act of the Territory of New Mexico, above men-

tioned, provided, of course, we are correct in our contention that the Employers' Liability Act is wholly void; for, if we are wrong in this, then undoubtedly there was no error committed by the courts of the State of Texas which are reviewable in this court.

Before the time when the appeal from the trial court was perfected, the Court of Civil Appeals of the State of Texas, to which said case was appealed, held that the Employers' Liability Act was totally void, in a decision rendered by that court in the case of A. T. & S. F. Ry. Co. vs. Mills (108 S. W. Rep., 480). That was the first time that this question had been before the courts of the State of Texas, and the plaintiff in error had a right to and did rely upon that decision, and upon the supposition that the Court of Civil Appeals would follow the doctrine laid down by it in the last mentioned case; and accordingly it took an appeal to said court, and said court, following the opinion in the Mills' case, held that the Employers' Liability Act was totally void and reversed this case. From the decision so reversing said case, a Writ of Error was sued out before the Supreme Court of the State of Texas, and the case was tried by the Supreme Court of Texas and that court reversed the Court of Civil Appeals.

In view of the fact that the Court of Civil Appeals sustained our contention and reversed the case, and that no appellate court of the State of Texas denied it until the Supreme Court did so in its final judgment, plaintiff in error was not up to that time by any superior court of the State of Texas deprived of any right, title or immunity guaranteed by the constitution and laws of the State of Texas, nor up to that time had the said courts of Texas refused to give full faith and credit to the statute of New Mexico, and, therefore, we had nothing to complain of.

In this case, from the beginning, the plaintiff in error has insisted that the Employers' Liability Act was void, and

that the liability or non-liability of the plaintiff in error arose under and must be determined by the laws of the Territory of New Mexico, where the accident occurred. This position of the plaintiff in error was made perfectly plain by its pleadings originally filed in this case, and it was sustained by the first appellate court to which the case was appealed, and never denied, until after the judgmen of the Supreme Court of Texas, and after such denial plaintiff in error's contention was again asserted in its petition for a writ of error to this court and the assignments of error which accompanied the same. It would, therefore, seem clear that this court has jurisdiction. (Connolly vs. Union Sewer Pipe Co., 184 U. S., 540.)

This court held in the Sowers' case, *supra*, and that decision renders it unnecessary to discuss the question further, that the statute of New Mexico which was pleaded in this case was valid, and that the liability or non-liability of a person for an accident resulting in injuries or death within the Territory of New Mexico arises under and must be determined by that statute, and that its provisions were conditions precedent which must have been complied with.

In this case plaintiff in error pleaded the statute and alleged that the defendant in error had failed to comply with its provisions, and, therefore, there was no cause of action, unless the Employers' Liability Act is valid as to the Territories, in which event, of course, its provisions supersede the statute of New Mexico pleaded by us.

It is our contention that the Employers' Liability Act is totally void and unconstitutional, and was so declared by this court in the Employers' Liability case (Howard vs. I. C. R. R. Co., 207 U. S., 463). There does not seem to be any reason why the Congress of the United States should single out the common carriers operating in the Territories and subject them to a heavier liability than common carriers operating in the States merely because of its plenary power over the Territories.

In case this court holds that the Employers' Liability Act is valid in so far as it affects cases arising within the Territories, then, unquestionably, no error was committed by the courts of the State of Texas which is reviewable by this court, and in this brief we have assumed that this court did not so hold, but that, on the other hand, this court held in the Howard case, *supra*, that Congress in enacting the Employers' Liability Act has exceeded its authority under the constitution, and that it was impossible for the court to separate the constitutional and unconstitutional portions of that statute and say whether or not Congress would have enacted the portions of the same which the court regarded as within its constitutional power had it known that it could not have enacted the balance; that the whole act was void. This court has held that statutes that are unconstitutional in part will only be upheld so far as not in conflict with the Constitution when the valid and invalid parts are severable, so that each may be read alone. Baldwin vs. Franks, 120 U. S., 678, and authorities therein referred to and quoted from.)

In Spraigue et al. vs. Thompson (118 U. S., 90) it was held that where, by rejecting as in conflict with the Constitution and laws of the United States certain exceptions in a statute, it is made to enact what confessedly the legislature never meant, the entire statute must be held annulled. We submit that that holding is applicable here.

If the question of the constitutionality of this Act was presented to this court in this case for the first time, we would feel at liberty to argue the same at some length, but, as it has been so recently passed on by this court, and by the very Justices who compose the court at this time, we feel it would be superfluous for us to now attempt an elaborate discussion of the question as to the constitutionality or unconstitutionality of the Employers' Liability Act, or as to the meaning and effect that should be given to the

decision in the Employers' Liability Act case. However, as we read and understand said decision, it plainly, and of necessity, contemplates that the act is void *in toto*.

Therefore, it is respectfully submitted that the judgment of the Supreme Court of the State of Texas, reversing the judgment of the Court of Civil Appeals and affirming the judgment of the District Court, should be reversed and the case remanded.

Respectfully submitted,

W. C. KEEGIN,

Counsel for Plaintiff in Error.

W. A. HAWKINS,
JOHN FRANKLIN,
El Paso, Texas,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 505

EL PASO & NORTHEASTERN RAILWAY CO.
Plaintiff in Error,

vs.

ENEDINA GUTIERREZ,
Administrator of Estate of Antonio Gutierrez, Deceased.

BRIEF FOR DEFENDANT IN ERROR.

SUGGESTION OF LACK OF JURISDICTION.

The defendant in error suggests to the Court that this Court has no jurisdiction to hear and determine this cause, and that this cause should be dismissed for want of jurisdiction. This case is unlike the case of Atchison, T. & S. F. Ry. Co. vs. Sowers, decided by this court March 1, 1909, in that that case was decided alone on the Territorial Statutes, as it

arose before the Employers' Liability Act was passed. It is apparent from the record in this case that the real object of the plaintiff in error is to have this Court review a decision of the State Court holding an act of Congress to be constitutional in its provisions which are applicable to territories, whereas this Court has jurisdiction to grant a writ of error to a State Court in a suit involving the validity of an act of Congress only when the decision is against its validity. No other alleged right under the United States can supercede this positive statutory provision. The alleged federal right claimed under a statute of the Territory of New Mexico is merely an abstract right which was wholly immaterial to a disposition of the case by the Supreme Court of Texas, if the act of Congress was valid, and was not in fact passed upon by the State Court; and there being no right to review the decision of the State Court sustaining the validity of the act of Congress, there is no such color of denial by the decision in this case of a material right claimed by plaintiff in error under the Territorial Statute as is requisite to confer jurisdiction on this Court.

The case of St. Louis, I. M. & S. R. Co. vs. Taylor, 210 U. S., 281, which is relied upon by plaintiff in error, is not in point. In that case the plaintiff in error contended for a construction of an act of Congress under which it would not be liable. It, therefore, claimed rights under the statute. In the case at bar the plaintiff in error claims no rights under the statute, and does not contend for a construction that would take its case out of the purview of the statute. The contention is simply, that the act is unconstituional, and the construction contended for is only incidental to and a means of reaching that conclusion. While this contention presents a

federal question it is not a federal question which can be raised on writ of error to a State Court, for the statute conferring appellate jurisdiction on this Court over State Courts limits the right of review to cases wherein there is drawn in question the validity of an Act of Congress, and the decision of the State Court was against the validity of the statute.

In support of these general observations, the following propositions are submitted:

I.

THE FEDERAL QUESTION RELIED UPON FOR JURISDICTION WAS NOT PASSED UPON BY THE SUPREME COURT OF TEXAS AND WAS NOT MATERIAL TO A DECISION OF THE CASE.

As the statute of the Territory of New Mexico of March 11, 1903, under which plaintiff in error claims it had a right to notice this claim for damages before suit was brought thereon, which right it alleged was denied it by the decision in this case, is limited, in its application, by its own terms, to a "civil liability under either the common law or any statute of this Territory," and, since the suit of defendant in error was not a suit at common law or under any Territorial statute, but was brought alone under the act of Congress of June 11, 1906, and was maintained alone on the latter statute, neither the existence nor the validity of the Territorial statute imposing restrictions on suits brought under common law or some Territorial statute was at all material to a decision of any issue in the suit, as brought and decided by the Supreme Court of Texas, on the act of Congress; nor was the validity of said Territorial statute in any way passed upon by the Supreme Court of Texas.

The statute of New Mexico pleaded by plaintiff in error (Rec. 6-7) did not create a right of action, but imposed conditions on rights of action that might arise at common law or under Territorial statute. The plaintiff's petition (Rec. 1) and supplemental petition (Rec. 8) both by allegations of facts to bring the case under the Act of Congress, and by express pleading of the act of Congress limited the cause of action to one brought under that act. ----------
The action being one for causing death did not exist at common law, and neither party in the trial court pleaded or proved the existence of any Territorial statute of New Mexico giving a cause of action for injuries causing death. If in the absence of evidence of a death statute of New Mexico, the trial Court might have presumed the existence of a death statute in New Mexico of the same import as that of the death statute of Texas, neither the trial Court nor the Supreme Court in fact, indulged such a presumption, or rested a decision of the case in whole or in part upon any supposed statute of Texas, or of the Territory of New Mexico, but rested the decision solely upon the Act of Congress under which the Suit was brought. The provisions of the Act of Congress applicable to Territories was the law of New Mexico, if valid, and if invalid, the defendant in error, having expressly rested her case on that statute, had no case under her pleading under any statute of Texas or of New Mexico; hence, neither the existence nor the validity of the restrictive statute pleaded, and which was applicable alone to suits brought under Territorial statutes or common law, was at all material to a decision of any issue in this cause. The case was in fact disposed of without deciding anything with reference to any statute of New Mexico. The

statement in the opinion of the Supreme Court of Texas with reference to defendant in error that "In her suit she claimed a recovery under each of said laws" is an error, as appears from the pleading of defendant in error. (See "Original Petition," Rec., p. 1.) Plaintiff's "First Supplemental Petition," Rec., p 8., which constitutes all of the pleadings of defendant in error, and which expressly based the action alone on the Act of Congress. But the statement of the Supreme Court of Texas in its opinion that "the Judge of the District Court gave a charge to the jury in which he virtually submitted the plaintiff's case upon the Act of Congress" is a correct statement from the record (page 9), and that judgment was affirmed by the Supreme Court alone because it was sustained under the Act of Congress. The doctrine of comparative negligence given in the charge to the jury, which is not held to be common law in Texas, and the commutation of damages in proportion to negligence of plaintiff and defendant, could have been given in charge to the jury only because it was made the law by the Act of Congress. It plainly appears that neither the trial Court nor the Supreme Court treated the Territorial statutes as at all applicable to the case. Hence the sole question which it was material to decide in this case, and the only question which was in fact decided, in the trial Court or by the Supreme Court of Texas, was: Is the act of Congress of June 11, 1906, in so far as applicable to Territories constitutional? As its validity in its provisions relating to Territories was sustained, no writ of error lies to a State Court.

The case having been decided on the Act of Congress, and plaintiff in error having no right to a writ of error to a State Court to review its decision sustaining the constitutionality

of an Act of Congress, the Federal question, involved in the decision, because not open to review, is upon the same plane, in that respect, as would be a decision on a purely local and non-federal question. In such a case the existence of other reviewable federal questions which are not decided furnishes no grounds for a writ of error, even though this Court might be of the opinion that the decision is erroneous, if the grounds upon which the decision is in fact rested is broad enough to dispose of the case on grounds which are not reviewable on writ of error to a State Court. In the case of Klinger vs. Missouri, 80 U. S., 13 Wall, 257 (20 L. ed 635), this Court, through Mr. Justice Bradley, said (words in parenthesis are ours): "The rules which govern the action of this Court in cases of this sort are well settled. Where it appears by the record that the judgment of the State Court might have been based either upon a law which would raise a (reviewable) question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent grounds, and it appears that the Court did in fact, base its judgment on such independent ground, and not on the law raising the (reviewable) federal question, this Court will not take jurisdiction of the case, even though it might think the position of the State Court untenable."

To read the point decided in that case into this case, it may be stated thus: As this case was in fact decided upon a non-reviewable ground—the constitutionality of the Act of Congress—which ground is independent of the Federal right asserted by plaintiff in error under statutes of New Mexico, this Court will not take jurisdiction of the case, even though it might think the position of the State Court sustaining the

Act of Congress in its application to Territories was untenable. The decision sustaining the constitutionality of the Act of Congress, in its provisions applicable to Territories is, as to plaintiff in error, as though it presented no Federal question; for the Act of Congress being sustained, no writ of error lies to the State Court to review that decision. That ground alone is sufficient upon which to rest the decision of the State Court, and the decision was in fact rested alone on that ground. A decision as to the validity or effect of the Territorial statute, which, by its terms, did not purport to impose restrictions on causes of action that might arise under an Act of Congress, was in no respect necessarily involved in the decision made, and the point was not in fact decided.

In Eustis v. Bolles, 150 U. S. 361, 37 L. ed 1111, this Court said:

"It is settled law that, to give this Court jurisdiction of a writ of error to a State Court, it must affirmatively appear, not only that a Federal question was presented for decision by the State Court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federals laws or Constitution, or that the judgment as rendered could not have been given without deciding it," citing Murdock v. Memphis, 87 U. S. 590; Cook County v. Calumet H. Canal & D. Co., 138 U. S. 635, and, continuing, this Court further said:

"It is likewise well settled law that, where the record discloses that a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, and another question, not Federal, has been also raised and decided against such party, and

the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this Court will not review the judgment."

In Beaupre v. Noyes, 138 U. S. 397, 34 L. ed 991, this Court said, with reference to a claim of right under a Territorial statute: "Whether the State Court so interpreted the Territorial statute as to deny such right to the plaintiff in error, we need not inquire, for it proceeded, in part, on another and distinct ground, not involving any Federal question, and sufficient, in itself, to maintain the judgment, without reference to that question." Also California Powder Works v. Davis, 151 U. S. 389. These propositions manifestly are as applicable where the ground upon which the case was decided involved a Federal question which was not reviewable by this Court, the constitutionality of an Act of Congress in its provisions as to Territories when the Act of Congress was sustained and also another reviewable Federal question—a claim under a Territorial statute—which was not decided, and which it was not necessary to decide in the disposition of the case, as they are applicable to the cases of which they treat.

II.

NO FEDERAL QUESTION ARISES ON DENIAL OF FULL FAITH AND CREDIT TO STATUTE OF TERRITORY WHICH WAS NOT AUTHENTICATED AS REQUIRED BY ACT OF CONGRESS.

It appears from the record that the alleged public act of New Mexico pleaded by plaintiff in error, and to which it alleges the Supreme Court of Texas refused to give full faith and credit, was not, as set out in hec verba, in the pleadings, authenticated as is required by the Act of Congress, in order

to be given full faith and credit; nor was there any pleading or proof that the copy sought to be used was so authenticated. While it is true that the Acts of Congress do not prescribe an exclusive rule of evidence, and judgments, and statutes may be admitted in evidence under other rules used in the forum of trial, yet judgments and public acts, in order to produce the effect, when proved, which the Acts of Congress give to them, must, as a matter of substance, be authenticated as required by the Acts of Congress, because the statute expressly limits the effects declared to copies when "so authenticated." Until a State Court has in some manner acted on a copy of such public act which was, at the time the action of the State Court thereon, in fact so authenticated, or alleged to be so authenticated, if the action is taken on pleading, it cannot be said that the State Court has refused full faith and credit to a public act brought within the purview of the statute. The plea setting up the unauthenticated copy of the Territorial statute without alleging that it was authenticated as is required by the Acts of Congress, was bad in substance and raised no Federal question.

Caperton v. Ballard, 81 U. S. (14 Wall) 238, 20 L. ed 885.

In the case just cited a record of a judgment rendered in the State of Virginia was read in evidence in a trial Court in West Virginia. It was treated in the trial in the State Court as a true copy of a judgment, and admitted in evidence as such. It was not, however, authenticated under the Acts of Congress. This Court held that no Federal question arose from a refusal to give full faith and credit to a copy of a judgment which had been admitted in evidence as proved for some purposes, but which had not been authenticated under the Act of Congress so

as to require the statutory effect to be given to it. This Court in that case said: "If a judicial proceeding has the effect of record evidence in the Courts of the State from which it is taken, it has the same effect in the Courts of every other State. To receive this conclusive effect, however, it must not only be pleaded, but proved in conformity with the Act of Congress on the subject. Unless this is done there is nothing for the Court to act upon. It is only through the instrumentality of the statute that the clause of the Constitution, which the plaintiff in error relies on, can be invoked for his protection. Legislation was required to make the constitutional provision effective, and this having been done by a general law, it requires no argument to show that a party cannot claim that a right under the Constitution and laws has been denied by a State Court, unless he has used the means for his protection which the statute directs."

After reciting the proof on which the record in question was admitted in evidence at the trial in the State Court, this court said:

"This proof, if received by the State Court as sufficient to establish the record of a judicial proceeding in Monroe county, while a part of Virginia, lacked the formalities required by the Act of Congress."

As to the pleadings, this court further said: "It is doubtless unfortunate that the plaintiff in error did not in proper terms set up the right he now claims, and conform his proof to the requirements of the law."

In the case of Atchison T. & S. F. R. Co. v. Sowers, decided by this Court March 1, 1909, the U. S. statute governing authentication of Acts of Legislatures was held to

apply to the Territory of New Mexico, and it was there held that those statutes prescribe the rule and rights of litigants as to Territorial statutes. That case arose before the passage of the Act of Congress of June 11, 1906, known as Employers' Liability Act, and the action there in question was brought under the Territorial statute in a Texas Court.

III.

NO FEDERAL RIGHT WAS SPECIALLY SET UP AND CLAIMED.

The Federal right claimed by plaintiff in error in this Court was not "specially set up and claimed" by plaintiff in error in its pleading, motion for new trial or in assignments of error or otherwise on appeal in the State Court. The Territorial statute was pleaded by plaintiff in error, but no such effect was claimed for it as that given it under the United States statute when it is brought within the terms of this statute. The claim of right set up under the Territorial statute was not, therefore, apparently other than an appeal to the State Court to give such effect to the statute as it was entitled to under comity of States and Nations, and which is usually exercised in the administration of foreign laws, and, as thus pleaded, the contention presented no Federal question. It did not present any Federal question for the further reason, noticed in the next preceding proposition, to the effect that the copy pleaded and set out did not appear to have been authenticated under the United States statute, nor was it pleaded that it was so authenticated; hence there was nothing before the State Courts to show that plaintiff in error claimed, or had brought itself under the terms of the Federal statutes,

or that it would do so, in order to be entitled to have the particular effect given the Territorial statute which the Federal law declares it shall have only when its terms are complied with. As to comity, see Walworth v. Harris, 129 U. S. 355, L. ed 32, 712.

In Sayward v. Denny, 158 U. S. 180, 39 L. ed, 941, this Court, after laying down the general rules as to the necessity of specially claiming and setting up a Federal right in order to give this Court jurisdiction of a writ of error to a State Court, applies the principles decided to a case which is quite analogous to the one at bar. This Court said:

"The errors assigned question the various rulings of the trial Court, which were passed on and sustained by the Supreme Court, but of these, reference need be made to but two, namely, in respect of the admission in evidence of the judgment recovered by Haller against Crawford, and the exclusion of evidence offered to show that Sayward was not liable to Haller to the extent of the judgment recovered by Haller against Crawford. The contention is that the result of the rulings and decisions of the trial Court in these respects, as affirmed by the Supreme Court, was to hold plaintiff in error conclusively bound by the judgment rendered against Crawford in an action in which he was not a party and of which he had no notice; and that this was in effect to deprive him of his property without due process of law, or to deny him the equal protection of the laws, and amounted to a decision adverse to the right, privilege or immunity of plaintiff in error under the Constitution of being protected from such deprivation or denial.

"But it nowhere affirmatively appears from the record

that such a right was set up or claimed in the trial Court when the demurrer to the complaint was overruled, or evidence admitted or excluded, or instructions given or refused, or in the Supreme Court in disposing of the rulings below."

After quoting from the State Supreme Court's opinion showing that no such constitutional right was there discussed, this Court said:

"We are not called upon to revise these views of principles of general law considered applicable to the case in hand. It is enough that there is nothing in the record to indicate that the State Courts were led to suppose that plaintiff in error claimed the protection of the United States from the several rulings, or to suspect that each ruling as made involved a decision against a right specially set up under that instrument."

In the case quoted from the pleadings and evidence and objections thereto showed the facts and rulings which included in a general way all that was necessary to raise a Federal question, but the Federal question was not specially claimed and set up so as to call the attention of the State Court to the fact that a right was asserted under the Constitution of the United States, so as to invoke a ruling of the State Court with special reference to the application of a Federal question to the facts. In the case at bar not all the facts were pleaded which were necessary to raise the Federal question, as to the Territorial statute. No authentication of it under the United States statute was pleaded, nor was the right claimed to invoke the Territorial statute specially based upon any claim of a right under the Federal statute, but may as well have been pleaded under the rules of comity enforced by a state with reference to foreign laws. When exceptions were interposed to

the answer and sustained, still no right under the Federal statute or Constitution was set up or claimed, and all the proceedings afterwards in the State Courts, while complaining of error of the trial Court in not enforcing the Territorial statute, nowhere specifically set up a claim to have full faith and credit given the statute or complained that this had been denied plaintiff in error.

In the case of Oxley Stave Co. v. Butler County, 166 U. S. 648, after holding that allegations that a decree in question had been obtained against some dead person and other absent persons who had no notice of the suit did not constitute a claim specially set up under the Constitution of the United States, notwithstanding such facts might frequently raise a contention of deprivation of property without due process of law, this court said:

"These words were in the 25th section of the Judiciary Act of 1789 (1 Stat. at L. 85), and were inserted in order that the revisory power of this Court should not extend to rights denied by the final judgment of the highest Court of a State, unless the party claiming such rights plainly and distinctly indicated before the State Court disposed of the case, that they were claimed under the Constitution, treaties or statutes of the United States. The words "specially set up or claimed" imply that if a party intends to invoke for protection of his rights the Constitution of the United States or some treaty, statute, commission, or authority of the United States, he must so declare; and unless he does so declare "specially," that is, unmistakably, this Court is without authority to re-examine the final judgment of the State Court. This statutory requirement is not met if such declaration is so general in its char-

acter that the purpose of the party to assert a Federal right is left to mere inference."

41 L. ed 1149.

In the case last quoted from, Mr. Justice Harlan reviews a number of decisions of this Court on this question.

In Hoyt v. Thompson, 66 U. S. 1 Black 518, the same proposition was laid down on a state of facts so similar to those existing in the case at bar as to make the decision strongly applicable to this case. In that case, which was tried in New York, a statute and a judgment of New Jersey was pleaded and relied on in the trial, but no right to have them given full faith and credit under acts of Congress was specially set up or claimed otherwise than by pleading and relying on the judgment and statute of New Jersey to establish rights asserted in the case. It was held that the Federal right was not so specially set up or claimed as to confer jurisdiction on this Court to review the decision of the New York Court.

Strongly to the same effect is Michigan Sugar Co. v. Dix, 185 U. S. 112.

It does not appear from the opinion of the Supreme Court of Texas in this case that that Court understood that any Federal right was claimed with respect to the Territorial statute, nor does it appear from the record that the trial Court understood that there was such a Federal right claimed. Article 1018 of the Revised Statutes of Texas of 1895, which article was in force when the proceedings in this case were had in the State Court, reads as follows:

"The appellant or plaintiff in error shall in all cases file with the clerk of the Court below all assignments of error distinctly specifying the grounds upon which he relies, before he

takes the transcript from the clerk's office; all errors not distinctly specified are waived." There was no assignment of error distinctly raising any such federal question as that here presented, as will be seen by reading the assignments of error filed in the trial Court Rec. p. 23.

IV.

DOES NOT APPEAR THAT NEW MEXICO COURTS GIVE OTHER EFFECT TO THE TERRITORIAL STATUTE OVER THE ACT OF CONGRESS IN QUESTION THAN IS GIVEN BY COURTS OF TEXAS IN THIS CASE.

The Courts of Texas were only required under the statute to give such faith and credit to the public acts of New Mexico "as they have by law or usage in the Courts" of New Mexico. As this court sitting in a case tried in a State Court takes judicial notice of only the facts of which the Courts of Texas might or should take judicial notice, and since those Courts cannot take judicial notice of what the decisions of the Supreme Court of New Mexico may have taken as to whether the Territorial act in question or the Act of Congress should be applied to a case such as this, the plaintiff in error in order to affirmatively show jurisdiction to maintain this writ of error, should have pleaded and offered to prove what the decisions of New Mexico, if any, on this subject have been, and having failed to do so, the record does not affirmatively show that full faith and credit was not given to the law of New Mexico, as it would have been given if this case had been tried in New Mexico.

Lloyd v. Matthews, 155 U. S. 222, 39 L. ed 128.

V.

THE DECISION THAT THE ACT OF CONGRESS, AND NOT THE TERRITORIAL STATUTE, WAS THE LAW OF NEW MEXICO WHICH WAS APPLICABLE TO THE CASE, DOES NOT DENY FULL FAITH AND CREDIT TO THE TERRITORIAL STATUTE.

It is only when the decision is against the validity of the Federal right claimed that a writ of error lies from this Court to a State Court. The record in this case shows beyond doubt that the Supreme Court of Texas did not decide against the validity of the Territorial statute in question, but, in its effort to decide what the law of New Mexico applicable to the case was, held that the Act of Congress, known as Employers' Liability Act, was the part of the law of New Mexico which was applicable to this case. A decision as to what law of another State or Territory is applicable to the case does not deny full faith and credit to its law, nor is such a decision one which under the authorities, is to be regarded as against the validity of the Territorial law.

The Territorial statute in question was by its terms applicable to all suits for personal injuries whether causing death or not which occurred in New Mexico, and which might arise at common law or under any statute of said Territory. The Act of Congress in question applied to the limited class of personal injury and death cases which might arise against common carriers engaged in commerce in a Territory or between a Territory and a State, and declared the facts, which in this field should give rise to an action under the Act of Congress by virtue of its own provisions, without reference to what might or might not give rise to a cause of action at common law or under a Territorial statute. The Supreme Court

of Texas did not hold either that the Territorial statute in question was invalid or that it had been repealed by this Act of Congress, but that the Act of Congress alone was applicable to this case wherein it was alleged and proved that plaintiff in error was a common carrier engaged in commerce in the Territory of New Mexico, and that defendant in New Mexico through negligence caused the death of the husband of defendant in error.

The jurisdiction of this Court to grant writs of error to State Courts is limited by Sec. 709 of the U. S. Revised Statutes to decisions of State Courts of last resort against the validity of "a treaty or statute of, or authority exercised under the United States."

It was decided by this Court in Atchison T. & S. F. Ry. Co. v. Sowers, in March, 1909, that a claim of right under a Territorial statute (involving the same statute as that pleaded in the case at bar) was a claim of a right under an authority exercised under the United States, and that the statute requiring full faith and credit to be given to the public acts of States and Territories was the measure of that right. That case arose before the Act of Congress under consideration in this case was passed and, therefore, arose alone under the Territorial statute; and the Territorial statute having been by the State Court held invalid in that case, of course this Court had jurisdiction of a writ of error therein.

Now keeping in mind that the statutes requiring full faith and credit to be given to the public acts of States and Territories define and limit the claim of a right under a Territorial statute, we find it established law in this Court, that no writ of error lies to a State Court in such cases, unless the decision

of the State Court is against the validity of the Territorial statutes. The meaning of the term, "against the validity thereof," is defined by this Court in the case of United States v. Lynch, 137 U. S. 280, 34 L. ed 700, wherein this Court said with reference to a contention that a decision was against the validity of an authority exercised under the United States:

"In order to justify this position, however, the validity of the authority must have been drawn in question directly and not incidentally. The validity of a statute is not drawn in question every time rights claimed under it are controverted, nor is the validity of an authority every time an act done by such authority is disputed. The validity of a statute or the validity of an authority is drawn in question when the existence or constitutionality, or legality of such a statute or authority is denied and the denial forms the subject of direct inquiry." And in Baltimore & P. R. Co. v. Hopkins, 130 U. S. 210, 32 L. ed 908, is was said by this Court that the validity of a statute and the validity of authority exercised under and supported by a statute were the same thing.

In Johnson v. New York Life Co., 187 U. S. 491, L. ed 47, 273, it was held by this Court that a refusal of the Supreme Court of Iowa to give any effect to a law of New York, pleaded because it was held inapplicable to the case, did not deny full faith and credit to the New York law, even though the Supreme Court of Iowa was in error in holding the New York law inapplicable to the case. This case and those cited in it establish the law to be that an error in attempting to administer in the courts of one state the laws of another state, does not amount to a denial of full faith and credit to the laws of the state thus sought to be administered.

This proposition was recently emphasized by this Court through Mr. Justice Brewer in the case of Smithsonian Institute v. St. John, decided May 17, 1909, Adv. Sheets L. Ed. of June 15, 1909, wherein a claim was set up of a denial of full faith and credit to the Constitution of Ohio in a case tried in the State of New York, in that the New York Court enforced an Ohio statute which it was contended was void under the Constitution." The writ of error was dismissed.

"It is unnecessary to hold that there was no error in the ruling of the Court of Appeals. It is enough for the purposes of this case to hold that that court did not question the validity of any provision of the Constitution of Ohio, and did not sustain any act of incorporation which it held to be in conflict with such provision. At most, there was simply a matter of error, and not a repudiation of the obligations of the Federal Constitution. The writ of error was dismissed.

The application of the views announced in the case last quoted from, to the case at bar is clear. In that case the Court of Appeals of New York in good faith credited the laws of Ohio and undertook to decide what the law was there. If in holding the statute of Ohio to be valid under the Constitution of Ohio, that Court erred, then the Constitution of Ohio was not in fact given its true legal effect, and the true law of Ohio was not in fact administered in the case. But this Court holds that all that was required of the New York Court was to give full faith and credit to the public acts of Ohio, and that this duty was performed when it did not repudiate the Constitution of Ohio or refuse to try to administer the laws of Ohio under that Constitution, but entered upon an effort in good faith to determine what the law of Ohio applicable to the case was, and ad-

ministered the law of Ohio as the Court of Appeals understood it.

In the case at bar the Courts of Texas laid aside the laws of Texas, and undertook to administer in this case the laws of New Mexico. The Courts were confronted with two statutes, the Territorial Act pleaded in the case, and the provisions of the Act of Congress in question, applicable to deaths caused through negligence by common carriers engaged in commerce in a Territory; the death for which the action was brought having been caused by such carrier in said Territory. This Act of Congress, if valid, controlled the case. The Court gave full faith and credit to the laws of New Mexico and attempted to decide which of its laws, the Territorial Act or the Act of Congress, applied to the case. If it erred and applied an unconstitutional law to the case, as for aught that this Court decided in the case just quoted from, the New York Court may have done in that case, still no question of denial of full faith and credit to the public acts of New Mexico arises in this case.

Prominence is given by plaintiff in error in its assignments of error to the fact that defendant in error in her exception to the plea of the Territorial statute of New Mexico in one of the reasons given in support of the exception denied the constitutionality of the Territorial statute. There was but one exception, and that challenged the sufficiency of the answer, and two reasons were given in support of the exception, first, because the statute of the Territory pleaded was superceded by Acts of Congress; second, because said Territorial law was unconstitutional. The trial Court sustained the exception without showing as to whether it was sustained upon both grounds or upon one ground only (Rec. 16, 17). The plaintiff

in error insists that this record shows that the trial Court held the Territorial statute invalid, and that the Supreme Court in affirming the judgment of the trial Court must have based its judgment in part on this constitutional objection to the Territorial statute, although the opinion of the Supreme Court shows that it rested its affirmance of the judgment of the Court below upon the fact that the trial Court tried the case on the Act of Congress. Two replies may be made to this contention. Either is sufficient to show it is untenable.

First. If we apply to the judgment of the trial Court the rule announced by this Court in Johnson v. Risk, 137 U. S. 300, 34 L. ed 683), as applicable to a judgment of the Supreme Court to revise which a writ of error was sought to be maintained, it will be seen that it does not affirmatively appear that the trial Court rested its judgment upon the supposed unconstitutionality of the Territorial statute. In the case cited this Court said:

"The defendant below demurred on two general grounds, one of which involved the construction of the provisions of the Bankrupt Act of March 2, 1867, and the other the bar of the Statute of Limitation of the State of Tennessee. So far as we are advised, no opinion was given by the Supreme Court of the State, upon rendering the judgment of affirmance, and the record discloses no specific statement of the ground upon which the Court proceeded." This Court held that no jurisdiction of this Court on writ of error was shown unless the defense of the statute of limitations was so palpably unfounded as to justify the presumption that the Court overruled it, and not so finding, the writ of error was dismissed.

Second. The Supreme Court of Texas to which the writ of error was issued expressly limited its decision to the constitutionality of the Act of Congress on which the suit was brought, as appears from its opinion which forms a part of the record. It is hardly necessary to add that no appellate court is necessarily confined on appeal to supporting the judgment of a trial Court which it affirms upon the same grounds that the trial Court may even expressly rest its decision.

VI.

THE CLAUSES OF THE JUDICIARY ACT PROVIDING FOR WRITS OF ERROR TO STATE COURTS WHEN THE PLAINTIFF IN ERROR CLAIMS A RIGHT UNDER THE CONSTITUTION OF THE UNITED STATES, CONFER NO ADDITIONAL JURISDICTION TO SUPPORT A WRIT OF ERROR TO IMPEACH THE VALIDITY OF AN ACT OF CONGRESS IN CASES WHEREIN THE VALIDITY OF AN ACT OF CONGRESS IS DRAWN IN QUESTION TO THAT CONFERRED BY THE CLAUSE EXPRESSLY APPLICABLE TO THAT SUBJECT AND WHICH LIMITS THE WRIT OF ERROR TO CASES WHEREIN THE DECISION OF THE STATE COURT IS AGAINST ITS VALIDITY.

The plaintiff in error by its fifth, sixth and seventh assignments of error asserts as grounds of jurisdiction alleged rights, privileges and immunities under the Constitution of the United States to have the Act of Congress, Employers' Liability Act, held to be unconstitutional. If it is unconstitutional, the plaintiff in error undoubtedly had the constitutional right to have it so declared, but not through the process of a writ of error from this Court to a State Court. He had the right to move this case from the State Court to the Circuit Court of the United States, and, if denied there his alleged constitutional rights, to have a writ of error from this Court to the Circuit Court. But having elected to have the case carried

through the State Courts, he must observe the limitations placed by law upon the appellate jurisdiction which this Court may exercise over a State Court of last resort. One of those limitations is that writs of error are allowed to State Courts in which is drawn in question a statute of the United States and the decision is against its validity, and only then by a litigant claiming right under the statute and not by one claiming against the statute. Sec. 709.

With reference to rights and privileges claimed under the Constitution or a statute this Court in Missouri ex rel Cary v. Andria, No. 138 U. S. 497, L. ed 34-138, after holding that the right to a writ of error in a case decided by a State Court would lie only at the instance of a party claiming a right under an Act of Congress, and not in favor of one claiming against the statute, said:

"The object of the present Judiciary Act was not to give a right of review wherever the validity of an Act of Congress was drawn in question, but to prevent the Courts of the several States from impairing or frittering away the authority of the Federal government, by giving a construction to its statutes adverse to such authority. Of course if the construction given by the State Court to the act under which the right is claimed be favorable to such right, no reason exists for a review by this Court." In Roosevelt v. Meyer, 68 U. S. (Wall) 512 17 L. ed 500), Mr. Justice Wayne said for the Court:

"I have been instructed by the Court to announce it to be our conclusion, upon the examination of the record, that as the validity of the Act of the 25th of February, 1862, was drawn in question, and the decision was in favor of it and of the right

set up by the defendant, this Court has no jurisdiction to revise the judgment."

It is obvious that to permit a litigant a writ of error to a State Court in a case wherein an Act of Congress is held to be constitutional, because he asserts rights against and in opposition to it, which act he contends is, and which may in fact be, unconstitutional, would annul the limitation imposed in the statute on the appellate jurisdiction of this Court over State Courts. As before said, the right to oppose the enforcement of an unconstitutional Act of Congress against him is a right or privilege under the Constitution of the United States, but it is not one which can be enforced through the appellate jurisdiction of this Court over State Courts. A party wishing to antagonize by appeal to this Court an Act of Congress which may be held to be constitutional by State Courts, must file or move the case into a Federal Court before the trial thereof.

The statute denying a writ of error to a State Court when the validity of an Act of Congress is drawn into question, and the act is sustained, covers all the rights a litigant has under the law in such a case, and he cannot spell out from under this special provision making the rule as to writs of error in such cases by characterizing the right to oppose the validity of the Act of Congress as a right, privilege or immunity under the Constitution coming under other clauses of Sec. 709. Whatever the other clauses mean, they do not include cases wherein the validity of an Act of Congress is drawn in question and its validity is sustained. To so hold would nullify the denial in that clause of a writ of error in such cases. The rule expressly laid down as to cases wherein the validity of an Act of Congress is drawn in question is a special rule which exclusively

governs that class of cases, and the other provisions, though general enough to also include that subject, if it had not been first specifically treated, do not apply thereto. Any other construction would breed a conflict between the different clauses of the section.

VII.

NO FEDERAL RIGHT EXISTS UNDER A TERRITORIAL STATUTE IN A STATE COURT WHICH WILL SUPPORT A WRIT OF ERROR FROM THIS COURT, OTHER THAN THAT PROVIDED FOR BY U. S. STATUTE REQUIRING IT TO BE GIVEN FULL FAITH AND CREDIT.

The first two assignments of error rest upon the complaint that the Texas Courts refused to give full faith and credit to the Territorial act in question, basing the contention on the statute requiring the giving of full faith and credit to public acts of Territories, etc.

The third, fourth, fifth, sixth and seventh assignments of error claim rights, privileges and immunities under the Territorial statute, but characterize them as rights, privileges and immunities under the Constitution and under authority exercised under the United States, without reference to the statute defining the rights of persons claiming under a Territorial statute in the Courts of a State. If plaintiff in error undertakes, in these assignments of error, to assert rights under said Territorial statute other than those which are defined and provided for by the statutes as to full faith and credit, etc., it is respectfully submitted that no such additional undefined Federal rights can be made the basis of jurisdiction of the writ of error in this case.

The section of the Judiciary Act (U. S. R. Statutes, Sec. 709), defining the appellate jurisdiction of this Court over State Courts does not create or define rights, privileges or immunities under the Constitution or define the term authority, exercised under the United States, and the Constitution and Statutes of the United States must be examined to find the rights therein referred to. The Constitution made no provision for giving any effect to the public acts of Territories in the Courts of other States or Territories, and even as to public acts of states, it was held inoperative without legislation. This Court in the recent case of Atchison, T. & S. F. R. Co. (decided March 1st, 1909, Adv. Sheets L. ed Apr. 1, 1909), said:

"Before this statute the effect which would have been given to the judgment of the Court of a Territory rested alone upon principles of comity. These acts are now and by force of statute, to be given the force and effect that they would be given in the Territory that passed them." We think it clear that there are no rights, privileges or immunities that can be successfully claimed under a statute of a Territory in another State or Territory from that in which it was enacted and which can be said to exist under the Constitution or laws of the United States, other than the rights, privileges and immunities defined and limited by the statute requiring them to be given full faith and credit, etc. We have already referred to the decisions of this Court which settle the extent to which this Court will take jurisdiction of a writ of error to a State Court where it is claimed that rights under that statute have been denied by a State Court.

VIII.

NO CLAIM OF RIGHT TO A PARTICULAR CONSTRUCTION OF AN ACT OF CONGRESS CONFERS JURISDICTION IN FAVOR OF ONE WHO CLAIMS NO RIGHT UNDER THE STATUTE, OR CONTENDS FOR A CONSTRUCTION WHICH WILL TAKE ITS CASE OUT OF THE TERMS OF THE STATUTE, BUT WHO CONTENDS FOR A CONSTRUCTION MERELY AS A MEANS AND AS INCIDENTAL TO IMPEACHING ITS VALIDITY WHICH MAY NOT BE DONE UNDER THE JUDICIARY ACT ON WRIT OF ERROR TO A STATE COURT WHICH HAS SUSTAINED ITS VALIDITY.

The contention that plaintiff in error has a right to a writ of error because he insists on a construction of an Act of Congress which would destroy it cannot be maintained. The only cases in which a writ of error is allowed to a State Court on a contention for a particular construction of an Act of Congress, are cases wherein the plaintiff in error claims rights or immunities under the Act of Congress or relied upon a construction thereof which would pretermit his case therefrom. Of this class of cases is St. Louis, I. M. & S. Co. v. Taylor, 210 U. S. 281, which is relied upon by plaintiff in error. But when the right to maintain a particular construction of an Act of Congress is not based upon a claim of right under the statute or to have it so construed as to pretermit his case therefrom, but is merely incidental to the right asserted to have the act held unconstitutional, the incidental contention cannot furnish a ground for a writ of error when the real ground, to which it is merely incidental, will not serve as a basis for a writ of error. The right to have a certain construction placed on the Act of Congress which plaintiff in error asserts, is the right to have its provisions with respect to Territories and its provisions relating to interstate commerce construed as so inseverably blended as to require

the provisions with respect to Territories to fall with the provisions relating to interstate commerce which have been held unconstitutional. This is merely asserting a right to a writ of error to a State Court to have an Act of Congress declared unconstitutional because of a construction contended for, after the State Court has sustained the validity of the Act of Congress. The construction contended for is only a means to an end, and the end is to obtain a writ of error in favor of one who asserts no right under the statute and seeks no construction of it which would take its case out of the terms of the statute, but seeks by construction to destroy the statute. Under the guise of a right to insist on a construction of the statute, plaintiff in error expects, in contravention of the statutes of the United States, to maintain a writ of error to a State Court to review its decision in a case wherein was drawn in question the validity of an Act of Congress and its validity was sustained by the State Court. The U. S. statutes deny the right to a writ of error to a State Court in such cases and they may not be thus circumvented.

ON THE MERITS.

The Act of Congress in its provisions relating to the District of Columbia and the Territories, is such a law as Congress had the power to enact, and said provisions are clearly severable from the provisions relating to interstate and foreign commerce, and there is no sufficient reason for believing that Congress would not have passed alone the provisions relating to the District of Columbia and the Territories if it had known that the other provisions were invalid as to justify a decision that these provisions fall with the unconstitutional

provisions. It is respectfully suggested that there was no intention on the part of this Court to decide the constitutional question here presented in passing on the validity of the provisions in relation to interstate commerce in the Employers' Liability cases. This appears from several considerations.

First. Because this question was not before this Court for decision in said cases, as neither of them arose in the District of Columbia or in a Territory, and it is the settled policy of this Court not to decide constitutional questions except when their decision is necessary to a disposition of a case in this Court.

Second. Because the question of the severableness of the provisions of the statute relating to the District of Columbia and the Territories from the other provisions is wholly different from the question of the severableness of the provisions governing master and servant in their relations to interstate commerce from their blended condition with the general provision which was so comprehensive as to include all the relations of master and servant to each other. The whole argument of the opinion is addressed to demonstrating the unconstitutionality of the latter provisions and the impossibility of severing the two subjects in relation to interstate commerce and sustaining the provisions as to one subject as valid and severable from the other subject as to which they are held unconstitutional. It is not to be supposed that the important question of the severableness of the provisions relating to the District of Columbia and the Territories from the unconstitutional provisions would have been passed upon without being discussed in the opinion.

Third. The limitation in the last paragraph of the opinion of the subjects said to be so blended as to fall together to two subjects, whereas there were in the act three general subjects, interstate commerce, foreign commerce, and commerce in the District of Columbia and the Territories, shows that the question of the blending of the latter subject with the other was not passed upon.

Fourth. If the majority opinion really passes on the severableness of the provisions of the statute in relation to the District of Columbia and the Territories, the decision as to the latter subject is mere dicta and is not an authority which will control the disposition of this case.

On the proposition that the provisions applicable to the District of Columbia and the Territories are constitutional and do not fall with the other provisions, we accept as our argument the opinion of the Supreme Court of Texas in the record and the portion of the opinion of the Court of Appeals of the District of Columbia bearing on this subject in Hyde, Admnx., v. Southern Ry. Co., 31 App. D. C. 466, as follows:

Mr. Chief Justice Shepard delivered the opinion of the court:

2. The primary question is as to the validity of the said act, entitled: "An Act Relating to Liability of Common Carriers in the District of Columbia and Territories and Common Carriers Engaged in Commerce Between the States and Between the States and Foreign Nations to Their Employees." Section 1, which is the only one necessary to be recited, reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several states, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employees, or, in the case of his death, to his personal representative, for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works." (34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1907, p. 891.).

The Supreme Court of the United States has recently held this act to be repugnant to the Constitution in so far as it extends to injuries received, in a State, by employes of a railway company engaged in interstate commerce. Employers' Liability Cases (Howard v. Illinois C. R. Co.), 207 U. S. 463, 52 L. ed —, 28 Sup. Ct. Rep. 141. In the opinion of the Court it was said by Mr. Justice White: "The act, then, being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employes, without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce * * *. So far as the face of the statute is con-

cerned, the argument is this: that, because the statute says carriers engaged in commerce between the States, etc., therefore, the act should be interpreted as being exclusively applicable to the interstate commerce business and none other of such carriers, and that the words 'any employe,' as found in the statute, should be held to mean any employee when such employe is engaged only in interstate commerce. But this would require us to write into the statute words of limitation and restriction not found in it. But, if we could bring ourselves to modify the statute by writing in the words suggested, the result would be to restrict the operation of the act as to the District of Columbia and the Territories. We say this because immediately preceding the provision of the act concerning carriers engaged in commerce between the States and Territories is a clause making it applicable to 'every common carrier engaged in trade or commerce in the District of Columbia or in any Territory of the United States.' It follows, therefore, that common carriers in such Territories, even although not engaged in interstate commerce, are, by the act, made liable to 'any' of their employees, as therein defined. The legislative power of Congress over the District of Columbia and the Territories being plenary, and not depending upon the interstate commerce clause, it results that the provision as to the District of Columbia and the Territories, if standing alone, would not be questioned. Thus it would come to pass, if we could bring ourselves to modify the statute by writing in the words suggested—that is, by causing the act to read 'any employee when engaged in interstate commerce'—we would restrict the act as to the District of Columbia and the Territories, and thus destroy it in an important particular.

To write into the act the qualifying words, therefore, would be but adding to its provisions in order to save it in one asspect, and thereby to destroy it in another; that is, to destroy in order to save and to save in order to destroy. The principles of construction invoked are undoubted, but are inapplicable. Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is ambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that, where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy. They were all, after a full review of the authorities, restated and reapplied in a recent case. Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed 298, 27 Sup. Ct. Rep. 153, and authorities there cited."

Necessarily all that was actually decided in that case was that, in so far as the act relates to carriers engaged in business in the States, it is repugnant to the Constitution in that it applies to all employes whether engaged or not in interstate commerce at the time of injury; and that it can not be restricted, by construction, to employees engaged in inter-

state commerce alone, in order to save its constitutionality. We have inserted the lengthy extract from the opinion in that case not only to show the grounds on which the decision rests, but also because some of the language quoted is relied on by both parties in this case in support of their respective contentions. As said therein, the power of Congress in the District of Columbia is plenary, and extends to the regulation of all commerce of whatsoever nature that may be carried on within its boundaries; and the act expressly applies to all employees of common carriers in said District without regard to the character of the commerce engaged in. If, therefore, the operation of the act had been confined by its terms to the District of Columbia and the Territories, there could be no doubt of its constitutionality. This power cannot be exercised in a State, but is restricted to the regulation of commerce among the several States.

Congress having undertaken to exercise plenary power in the one act, as it has been interpreted, not only in the District of Columbia and the Territories, where it has been conferred, but also in the States, where it has not, the question for our determination is whether the provisions of the same, as they relate to the respective jurisdictions, are separable and not dependent upon each other, so that one may stand notwithstanding the invalidity of the other. The rule in this regard is well settled, as we have seen; the difficulty lies in its application.

This condition of severableness of the provisions of a statute, that may preserve the validity of one notwithstanding the repugnance of the other to the Constitution, is not dependent upon the fact that they may be found in separate sec-

tions, though this would ordinarily render the task of separation easier. It is sufficient if the separation can be accomplished by exercising a clause of the same section, and leaving the remainder complete and unchanged in meaning without reading into it another word. Penniman's Case (Vial v. Penniman), 103 U. S. 714, 717, 26 L. ed 602, 604; Diamond Glue Co. v. United States Glue Co., 187 U. S. 611, 617, 47 L. ed 328, 333, 23 Sup. Ct. Rep. 206; Florida C. R. Co. v. Schutte, 103 U. S. 118, 142, 26 L. ed 327, 335.

We think it is evident from the language of the title and the first clauses of Sec. 1, of the act, that, in its enactment, Congress contemplated the exercise of its plenary power in the District of Columbia and the Territories, and of only its limited power in the States. This general intention, as regards the latter, was thwarted by the use of language, appropriate to the exercise of its plenary power, but not to the exercise of its limited power, making the common carrier, who might also be engaged in interstate commerce liable to "any of its employes," without discrimination in respect of the character of the business in the conduct of which the injury might occur. We do not think, however, that the purpose to make the new rule of law, defining the relations of master and servant, apply to "every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States," is made abortive by the next clause making it apply also to common carriers engaged in commerce among the several States. This second clause of provision can be eliminated without impairing the particular effect or changing the meaning of the first in any particular. Striking out the second clause, the section would read as fol-

lows: "That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, * * * shall be liable to any of its employees, or, in case of his death, to his personal representative, for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works." (34 Stat. at L. 232, Chap. 3073, U. S. Comp. Stat. Supp. 1907, p. 891). As thus read, the section is perfect and complete without the addition of a new word or the slightest change in the meaning of one that has been used. The situation is quite different from that presented in the case of United States v. Reese, 92 U. S. 214, 221, 23 L. ed 563, 565, where it was said that the proposed effect was sought to be maintained, not by striking out or disregarding words that are in the section, but by inserting words not now there. The same difference exists between the conditions of this case and those of the case chiefly relied on by the appellees. Illinois C. R. Co. v. McKendree, 203 U. S. 514, 529, 51 L. ed 298, 304, 27 Sup. Ct. Rep. 153.

3. The provisions of the section being deemed severable, the next question is, whether it is plain that Congress would have enacted the act with the unconstitutional provision eliminated? We see no reason to doubt that it would have done so. One of the special duties of Congress is to legislate generally for the benefit of the inhabitants of the District of Columbia and the Territories. That duty in respect of the

adequate protection of the employees of common carriers engaged in trade or commerce therein is in no wise dependent upon its performance in respect of the limited class of employees subject to its jurisdiction in the several States. The latter may be, and are in great measure, protected by State legislation. They have another power to appeal to for their relief, while those in the District of Columbia have not. No apparent reason appears why Congress would not have extended this relief to them, unless coupled with the relief which it sought ineffectively to extend to others. Lifting the burden of the rule of the common law from all employees of carriers in the District and Territories adds nothing to that borne by the second class of employees in the several States that have not yet undertaken their relief. That the performance of its duty to all employees of carriers in the District of Columbia, and the Territories, exclusively within its power, was first in mind, is indicated by the fact that they are first mentioned in the act, with comprehension of all such employees in whatever character of trade or commerce their employees may be engaged."

F. G. MORRIS,

Counsel for Defendant in Error.

clause, and a statute regulating such commerce necessarily supersedes a territorial statute on the same subject.

An act of Congress may be unconstitutional as measured by the commerce clause, and constitutional as measured by the power to govern the District of Columbia and the Territories, and the test of separability is whether Congress would have enacted the legislation exclusively for the District and the Territories.

The rule that the court must sustain an act of Congress as constitutional unless there is no doubt as to its unconstitutionality also requires the court to sustain the act in so far as it is possible to sustain it.

This court did not in its decision of the *Employers' Liability Cases*, 207 U. S. 463, hold the act of June 11, 1906, c. 3073, 34 Stat. 232, unconstitutional so far as it related to the District of Columbia and the Territories, and expressly refused to interpret the act as applying only to such employés of carriers in the District and Territories as were engaged in interstate commerce.

The evident intent of Congress in enacting the Employers' Liability Act of June 11, 1906, was to enact the curative provisions of the law as applicable to the District of Columbia and the Territories under its plenary power irrespective of the interstate commerce feature of the act, and although unconstitutional as to the latter as held in 207 U. S. 463, it is constitutional and paramount as to commerce wholly in the District and Territories.

The Employers' Liability Act of June 11, 1906, being a constitutional regulation of commerce in the District of Columbia and the Territories necessarily supersedes prior territorial legislation on the same subject and non-compliance by the plaintiff employé with a provision of a territorial statute (in this case of New Mexico) cannot be pleaded by the defendant employer as a bar to an action for personal injuries.

117 S. W. 426, affirmed, and *Hyde* v. *Southern Ry. Co.*, 31 App. D. C. approved.

THE facts, which involve the constitutionality of the Employers' Liability Law of June 11, 1906, c. 3073, 34 Stat. 232, as applied to the Territories of the United States, are stated in the opinion.

Mr. W. C. Keegin, *Mr. W. A. Hawkins* and *Mr. John Franklin* for plaintiff in error:

This court has jurisdiction to review the judgment of the

state court of Texas; the plaintiff in error as defendant below asserted the unconstitutionality of the Employers' Liability Act and that this case was controlled by the statute of New Mexico. The denial of this claim was the denial of a Federal right. *St. Louis &c. Ry. Co.* v. *Taylor*, 210 U. S. 281, 293; *Ill. Cent. R. R. Co.* v. *McKendree*, 203 U. S. 514. The statute of New Mexico has been upheld in this court. *A., T. & Santa Fe Ry.* v. *Sowers*, 213 U. S. 55. The Employers' Liability Act is void *in toto*. The decision of this court in 207 U. S. 463, forecloses that question. The statute is not separable as nothing shows that Congress would have enacted it exclusively as to the Territories. *Sprague* v. *Thompson*, 118 U. S. 90.

Mr. F. G. Morris for defendant in error:

This court does not have jurisdiction of the appeal. The New Mexico statute did not create a right of action but only improved conditions. *Klinger* v. *Missouri*, 13 Wall. 257; *Eustis* v. *Bolles*, 150 U. S. 361; *Beaupré* v. *Noyes*, 138 U. S. 397.

The decision that the act of Congress and not the territorial statute controlled the case does not deny full faith and credit to the territorial statute. *United States* v. *Lynch*, 137 U. S. 280; *Balto. & Pot. R. R. Co.* v. *Hopkins*, 130 U. S. 210; *Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491; *Smithsonian Institution* v. *St. John*, 214 U. S. 19.

No Federal right exists under a territorial statute in a state court which will support a writ of error from this court other than that provided for by the statute requiring it to be given full faith and credit. *A., T. & Santa Fe Ry.* v. *Sowers*, 213 U. S. 55.

The Employers' Liability Act is within the power of Congress to enact so far as applicable to the District of Columbia and the Territories, and that question is not affected by the decision of this court in 207 U. S. 463, which related only to the act as applicable to the States. The provisions as to the

District of Columbia and the Territories are separable from those as to the States and would have been independently enacted by Congress. *Hyde* v. *Southern Ry. Co.*, 31 App. D. C. 466; *Vial* v. *Penniman*, 103 U. S. 714; *Diamond Glue Co.* v. *United States Glue Co.*, 187 U. S. 611; *Florida Cent. R. R. Co.* v. *Schutte*, 103 U. S. 118.

MR. JUSTICE DAY delivered the opinion of the court.

In this case an action was commenced by Enedina Gutierrez, as administratrix of the estate of Antonio Gutierrez, in the District Court of El Paso County, Texas, against the El Paso and Northeastern Railway Company, to recover damages because of the death of the plaintiff's intestate by wrongful act while engaged in the service of the railway company, a common carrier in the Territory of New Mexico, on June 22, 1906. By way of special plea and answer the railway company set up a statute of the Territory of New Mexico, wherein it is provided that no actions for injuries inflicting death caused by any person or corporation in the Territory shall be maintained, unless the person claiming damages shall, within ninety days after the infliction of the injury complained of and thirty days before commencing suit, serve upon the defendant an affidavit covering certain particulars as to the injuries complained of, and containing the names and addresses of all witnesses of the happening of the alleged acts of negligence. Suit must be brought within one year, and in the District Court of the Territory in and for the county in which the injuries were received, or where the injured person resides; or, in a claim against a corporation, in the county of the Territory where the corporation has its principal place of business. This act is set out in full in the marginal note to the case of *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 213 U. S. 55.

The special answer sets forth that the accident happened in the Territory of New Mexico, while the statute was in full force, and that its terms and provisions were not complied with.

To the special answer the plaintiff below interposed a demurrer, and further, by way of supplemental petition, set forth that the injuries complained of happened after the passage of the so-called Employers' Liability Act, June 11, 1906, c. 3073, 34 Stat. 232. This act, the plaintiff alleged, controlled the liability of the defendant in the case. The District Court sustained the demurrer of the plaintiff to that part of the defendant's answer which set up the territorial act of New Mexico, to which ruling the railway company duly excepted. The case then went to trial to a jury upon issues made concerning the liability of the railway company under the Federal Employers' Liability Act of June 11, 1906, 34 Stat. 232. The result was a verdict and judgment in favor of the plaintiff against the railway company. The case was then taken to the Court of Civil Appeals of Texas, and that court held that it would not be governed by the territorial statutes, and that the Employers' Liability Act of June 11, 1906, was unconstitutional, upon the authority of *Employers' Liability Cases*, 207 U. S. 463, and certain cases in the Texas Court of Appeals. Upon rehearing a majority of the court held that the provisions of the New Mexico act as to the presentation of notice of claim for damages was a condition precedent to a cause of action, and that the trial court therefore erred in sustaining plaintiff's exception to that part of the defendant's answer which pleaded the territorial act and plaintiff's failure to present her claim in accordance with it. 111 S. W. Rep. 159. Thereupon the defendant took the case to the Supreme Court of Texas by writ of error, and that court held that the case was controlled by the act of Congress known as the Employers' Liability Act, 34 Stat. 232, and that the same was constitutional, and therefore held that the judgment of the Court of Civil Appeals should be reversed, and the original judgment of the District Court affirmed. 117 S. W. Rep. 426. From the judgment of the Supreme Court of the State a writ of error was prosecuted to this court.

Among other errors assigned is the failure of the Supreme

Court of Texas to give effect to the defense setting up the statute of New Mexico as a full defense to the action. While the Supreme Court of Texas in its opinion conceded that if the territorial act of New Mexico alone controlled the action the plaintiff must fail for non-compliance with its requirements, it reversed the judgment of the Court of Civil Appeals, and affirmed the judgment of the District Court, because in its opinion the liability was controlled by the Employers' Liability Act. The effect of this judgment of the Supreme Court of Texas was to deny the defense set up under the territorial act as a complete bar to the action. The District Court sustained the demurrer to the plea setting up this act, and thereby denied the rights specially set up under that statute, the Supreme Court of Texas overruled the Court of Civil Appeals and affirmed the judgment of the District Court. It thereby necessarily adjudicated the defense claimed under the territorial act against the railway company. If this defense sets up a Federal right within the meaning of § 709 of the Revised Statutes of the United States, then we have jurisdiction of the case. *Wabash R. R. Co.* v. *Adelbert College of Western Reserve University*, 208 U. S. 38, 44.

That the claim of immunity under the territorial act, because of the failure of the plaintiff in error to comply with its provisions as to the affidavit within ninety days, etc., presented a Federal question within the meaning of § 709 of the Revised Statutes, was decided in *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 213 U. S. 55, in which case it was held that where suit was brought in a state court a claim of defense under the provisions of the New Mexico statute was a claim of Federal right, which, when adversely adjudicated, gave jurisdiction to this court to review the judgment.

Coming to consider the merits: This court, in *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 213 U. S., *supra*, held that in order to give due faith and credit to the territorial statute, under § 906 of the Revised Statutes of the United

States, the plaintiff suing in a State must show compliance with the preliminaries of notice and demand as required by the territorial law. As the answer in the present case set up non-compliance with these requisites, and the state court sustained a demurrer thereto, the judgment must be reversed, unless the state court was right in denying the benefit of the territorial act thus set up, because the Federal Employers' Liability Act superseded the New Mexico law, and is constitutional so far as the Territories are concerned.

In view of the plenary power of Congress under the Constitution over the Territories of the United States, subject only to certain limitations and prohibitions not necessary to notice now, there can be no doubt that an act of Congress undertaking to regulate commerce in the District of Columbia and the Territories of the United States would necessarily supersede the territorial law regulating the same subject.

Is the Federal Employers' Liability Act of June 11, 1906, unconstitutional so far as it relates to common carriers engaged in trade or commerce in the Territories of the United States? It has been suggested that this question is foreclosed by a decision of this court in the *Employers' Liability Cases*, 207 U. S. 463. In that case this court held that, conceding the power of Congress to regulate the relations of employer and employé engaged in interstate commerce, the act of June 11, 1906, c. 3073, 34 Stat. 232, was unconstitutional in this, that in its provisions regulating interstate commerce Congress exceeded its constitutional authority in undertaking to make employers responsible, not only to employés when engaged in interstate commerce, but to any of its employés, whether engaged in interstate commerce or in commerce wholly within a State. That the unconstitutionality of the act, so far as it relates to the District of Columbia and the Territories, was not determined is evident from a consideration of the opinion of the court in the case. In answering the suggestion that the words "any employé" in the statute should be so read as to mean only employés en-

EL PASO & NORTHEASTERN RAILWAY COMPANY *v.* GUTIERREZ, ADMINISTRATRIX.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 505. Submitted October 11, 1909.—Decided November 15, 1909.

Where the effect of the judgment of the state court is to deny the defense that a statute of a Territory is a bar to the action, a claim of Federal right is denied and this court has jurisdiction under § 709, Rev. Stats., to review the judgment. *Atchison, Topeka & Santa Fe Ry.* v. *Sowers*, 213 U. S. 55.

The power of Congress to regulate commerce in the District of Columbia and Territories is plenary and does not depend on the commerce

gaged in interstate commerce, Mr. Justice White, delivering the opinion of the court, said:

"But this would require us to write into the statute words of limitation and restriction not found in it. But if we could bring ourselves to modify the statute by writing in the words suggested the result would be to restrict the operation of the act as to the District of Columbia and the Territories. We say this because immediately preceding the provision of the act concerning carriers engaged in commerce between the States and Territories is a clause making it applicable to 'every common carrier engaged in trade or commerce in the District of Columbia or in any Territory of the United States.' It follows, therefore, that common carriers in such Territories, even although not engaged in interstate commerce, are by the act made liable to 'any' of their employés, as therein defined. The legislative power of Congress over the District of Columbia and the Territories being plenary and not depending upon the interstate commerce clause, it results that the provision as to the District of Columbia and the Territories, if standing alone, could not be questioned. Thus it would come to pass, if we could bring ourselves to modify the statute by writing in the words suggested; that is, by causing the act to read 'any employé when engaged in interstate commerce,' we would restrict the act as to the District of Columbia and the Territories, and thus destroy it in an important particular. To write into the act the qualifying words, therefore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another; that is, to destroy in order to save and to save in order to destroy." 207 U. S. 500.

A perusal of this portion of the opinion makes it evident that it was not intended to hold the act unconstitutional in so far as it related to the District of Columbia and the Territories, for it is there suggested that to interpolate in the act the qualifying words contended for would destroy the act in respect to the District of Columbia and the Territories by

limiting its operation in a field where Congress had plenary power, and did not depend for its authority upon the interstate commerce clause of the Constitution. The act in question is set forth in full in a note to *Employers' Liability Cases*, 207 U. S. 463, 490. We are concerned in the present case with its first section only. This section reads:

"That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employés, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents or employés, or by reason of any defect or any insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works."

A perusal of the section makes it evident that Congress is here dealing, first, with trade or commerce in the District of Columbia and the Territories; and, second, with interstate commerce, commerce with foreign nations, and between the Territories and the States. As we have already indicated, its power to deal with trade or commerce in the District of Columbia and the Territories does not depend upon the authority of the interstate commerce clause of the Constitution. Upon the other hand, the regulation sought to be enacted as to commerce between the States and with foreign nations depends upon the authority of Congress granted to it by the Constitution to regulate commerce among the States and with foreign nations. As to the latter class, Congress was dealing with a liability ordinarily governed by state statutes, or controlled by the common law as administered in the

several States. The Federal power of regulation within the States is limited to the right of Congress to control transactions of interstate commerce; it has no authority to regulate commerce wholly of a domestic character. It was because Congress had exceeded its authority in attempting to regulate the second class of commerce named in the statute that this court was constrained to hold the act unconstitutional. The act undertook to fix the liability as to "any employé," whether engaged in interstate commerce or not, and, in the terms of the act, had so interwoven and blended the regulation of liability within the authority of Congress with that which was not that the whole act was held invalid in this respect.

It is hardly necessary to repeat what this court has often affirmed, that an act of Congress is not to be declared invalid except for reasons so clear and satisfactory as to leave no doubt of its unconstitutionality. Futhermore, it is the duty of the court, where it can do so without doing violence to the terms of an act, to construe it so as to maintain its constitutionality; and, whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid. It was held in the *Employers' Liability Cases* that in order to sustain the act it would be necessary to write into its provisions words which it did not contain.

Coming to consider the statute in the light of the accepted rules of construction, we are of opinion that the provisions with reference to interstate commerce, which were declared unconstitutional for the reasons stated, are entirely separable from and in nowise dependent upon the provisions of the act regulating commerce within the District of Columbia and the Territories. Certainly these provisions could stand in separate acts, and the right to regulate one class of liability in nowise depends upon the other. Congress might have regulated the subject by laws applying alone to the Territories,

and left to the various States the regulation of the subject-matter within their borders, as had been the practice for many years.

It remains to inquire whether it is plain that Congress would have enacted the legislation had the act been limited to the regulation of the liability to employés engaged in commerce within the District of Columbia and the Territories. If we are satisfied that it would not, or that the matter is in such doubt that we are unable to say what Congress would have done omitting the unconstitutional feature, then the statute must fall. *Illinois Central R. R. Co.* v. *McKendree*, 203 U. S. 514; *Employers' Liability Cases*, 207 U. S. *supra*.

When we consider the purpose of Congress to regulate the liability of employer to employé, and its evident intention to change certain rules of the common law which theretofore prevailed as to the responsibility for negligence in the conduct of the business of transportation, we think that it is apparent that had Congress not undertaken to deal with this relation in the States where it had been regulated by local law, it would have dealt with the subject and enacted the curative provisions of the law applicable to the District of Columbia and the Territories over which its plenary power gave it the undoubted right to pass a controlling law, and to make uniform regulations governing the subject.

Bearing in mind the reluctance with which this court interferes with the action of a coördinate branch of the Government, and its duty, no less than its disposition, to sustain the enactments of the national legislature, except in clear cases of invalidity, we reach the conclusion that in the aspect of the act now under consideration the Congress proceeded within its constitutional power, and with the intention to regulate the matter in the District and Territories, irrespective of the interstate commerce feature of the act.

While not binding as authority in this court, we may note that the act, so far as it relates to the District of Columbia,

was sustained in a well-considered opinion by the Court of Appeals of the District of Columbia. *Hyde* v. *Southern Ry. Co.*, 31 App. D. C. 466.

The judgment of the Supreme Court of Texas is

Affirmed.